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The Canadian Temporary Foreign Worker Program

Do Short-Term Economic Needs Prevail over Human Rights Concerns?

Delphine Nakache and Paula J. Kinoshita

Canada's growing focus on short-term labour migration is unfair to the vast majority of temporary foreign workers and will not help the country meet its long-term employment needs.

La vision à court terme du Canada en ce qui concerne la migration de travail temporaire est préjudiciable à la grande majorité des travailleurs étrangers et ne contribue pas à combler les besoins de main-d'œuvre à long terme du pays.

Diversité, immigration et intégration
Diversity, Immigration and Integration

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Summary

In recent years, the number of temporary foreign workers admitted to Canada has more than doubled. In this study, Delphine Nakache and Paula Kinoshita examine the Temporary Foreign Worker Program, in order to determine the Canadian and Albertan approaches to integrating and protecting these migrants. They consider three possible policy perspectives on the legal status of temporary foreign workers, according to whether the country of employment (1) sees temporary labour migration as an opportunity to integrate the workers; (2) is indifferent to their future position in society; or (3) tries to prevent their integration. In order to determine into which policy perspective Canada fits, the authors analyze three important integration mechanisms: employment, family unity and access to permanent residency.

In the field of employment, there is a discrepancy between policy and practice in regard to temporary foreign workers' rights. A significant factor is the restrictive nature of the work permit (temporary foreign workers are often tied to one job, one employer and one location), which can have the practical effect of limiting their employment rights and protections. Other problems include illegal recruitment practices, misinformation about migration opportunities and lack of enforcement mechanisms. In the context of employment, Canada seems indifferent to temporary foreign workers' future position in society.

On family unity and access to permanent residency, there are significant differences in their treatment, depending on their skill levels. The spouses of highly skilled workers are able to acquire open work permits, and highly skilled workers have the opportunity to get permanent residency from within. In contrast, the spouses of lower-skilled workers must apply for a restricted work permit, and lower-skilled workers, with few exceptions, have very limited opportunity to migrate permanently. Yet they can renew their temporary status so long as they have employment. Nakache and Kinoshita conclude that Canada encourages the integration of highly skilled workers and is indifferent to that of lower-skilled workers.

The authors argue that the short-term focus of Canada's temporary labour migration policy will not help the country realize its long-term labour market needs and is unfair to the vast majority of temporary foreign workers, who are expected to spend years in Canada without contributing to society in the long run. They offer a number of recommendations. To mention a few, they recommend that the work permit be restructured to allow these migrants greater mobility; that enforcement mechanisms be used to protect them from abusive practices; that communication between different governmental players be improved; that a policy be adopted to support the integration of temporary foreign workers; and that public debate about the recent changes in Canada's labour migration policy be encouraged.

Résumé

Le nombre de travailleurs étrangers temporaires admis au Canada a plus que doublé au cours des dernières années. Delphine Nakache et Paula Kinoshita examinent dans cette étude le Programme des travailleurs étrangers temporaires en vue de déterminer les approches canadienne et albertaine d'intégration et de protection de ces migrants. Elles s'intéressent à trois démarches politiques relatives au statut juridique des travailleurs temporaires selon que le pays qui les emploie (1) considère leur migration temporaire comme une occasion de les intégrer ; (2) est indifférent à leur position future dans la société ; ou (3) tente d'empêcher leur intégration. Afin de déterminer dans quelle démarche le Canada s'inscrit, elles analysent trois importants mécanismes d'intégration : l'emploi, la réunion des familles et l'accès à la résidence permanente.

Au chapitre de l'emploi, les auteures constatent un écart entre la politique et la mise en pratique en ce qui a trait aux droits des travailleurs étrangers temporaires. L'un des facteurs clés de cet écart réside dans la nature restrictive du permis de travail (les travailleurs étrangers temporaires étant souvent liés à un seul emploi, un seul employeur et un seul lieu de travail), qui peut avoir pour effet concret de limiter les droits et protections en matière d'emploi. Elles relèvent certains autres problèmes, notamment les pratiques de recrutement illégales, les renseignements erronés sur les possibilités de migration et la faiblesse des mécanismes d'exécution. Dans le contexte de l'emploi, elles concluent que le Canada semble indifférent à la position future des travailleurs étrangers temporaires dans la société.

Pour ce qui est de la réunion des familles et de l'accès à la résidence permanente, les auteures observent dans le traitement de ces travailleurs des différences significatives suivant leur niveau de compétence. Les conjoints des travailleurs hautement qualifiés peuvent ainsi obtenir une autorisation d'emploi ouverte, et les travailleurs hautement qualifiés ont la possibilité d'obtenir de l'intérieur du pays le statut de résident permanent. En revanche, les conjoints des travailleurs faiblement qualifiés doivent faire la demande d'une autorisation de travail restreinte, et les travailleurs faiblement qualifiés, sauf en de rares exceptions, ne peuvent guère envisager de devenir résidents permanents. Tout au plus sont-ils autorisés à prolonger leur statut temporaire tant qu'ils ont un emploi. D'où la conclusion que le Canada favorise l'intégration des travailleurs hautement qualifiés et reste indifférent à celle des travailleurs faiblement qualifiés.

Or cette vision à court terme de la politique canadienne sur la migration des travailleurs temporaires ne contribue aucunement à combler les besoins de main-d'œuvre à long terme du pays, soutiennent les auteures, tout en étant préjudiciable à la grande majorité des travailleurs temporaires étrangers, qui peuvent vivre plusieurs années au Canada sans contribuer durablement à la société. Elles formulent donc des recommandations visant à améliorer le Programme des travailleurs étrangers temporaires, dont les principales sont les suivantes : restructurer le permis de travail en vue d'accroître la mobilité de ces migrants ; appliquer des mécanismes d'exécution pour les protéger contre les pratiques abusives ; améliorer la communication entre les différents acteurs gouvernementaux ; adopter des mesures favorisant leur intégration ; et stimuler le débat public sur les récentes modifications à la politique canadienne de migration de la main-d'œuvre.

The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?

Delphine Nakache and Paula J. Kinoshita

> *We invited guest workers, and got human beings*
> — Max Firsch (International Labour Office 2004, 111)

Like many industrial countries, Canada faces significant demographic shifts as, for the first time in its history, the proportion of seniors is increasing at a higher rate than any other age group.[1] As the society ages and fertility rates decrease, Canada is experiencing labour market shortages of both skilled and lower-skilled workers, a trend that is likely to increase in the near future. Some estimates project that Canada will experience a labour shortage of nearly one million people by 2020 (Canadian Chamber of Commerce 2008). In such a context, immigration has been presented as vital to maintain both population growth and the labour force. In addition, the move to a knowledge-based economy means that the competition to attract and retain skilled workers has become particularly aggressive, as other industrialized countries face similar challenges in their own labour markets (see, for example, Abella 2006; Shachar 2006; CIC 2008a, 8). This changing landscape has had major impacts on Canadian immigration policies in recent years, one of which is the expansion of the Temporary Foreign Worker Program (TFWP).

As stated in section 3(1) of the *Immigration and Refugee Protection Act*[2] *(IRPA)*, one important objective of Canada's immigration policy is "to permit Canada to pursue the maximum...economic benefit of immigration" and "to support the development of a strong and prosperous Canadian economy." One way to do this is to promote temporary labour migration, which, "[i]n addition to [the selection of] permanent residents...and business people" is regarded as "important to [Canada's] economic growth" (CIC 2006, 22). In fact, temporary labour migration is characterized as the "principal tool to help employers meet immediate skill requirements when qualified Canadian workers cannot be found" (Finance Canada 2007, 217). As such, changes to the TFWP "to respond to employer needs" (Finance Canada 2006, 50) have been regarded as necessary so that employers are "able to hire temporary foreign workers more quickly and easily to meet immediate skills shortages" (CIC 2008a, 9) and "fast track international workers into in-demand jobs" (CIC 2009d; see also Alboim 2009, 21). As a result, recruitment of temporary foreign workers has grown rapidly in the past years.

Overall, the number of persons entering Canada on a temporary basis is on the rise. Indeed, in 2007, for the first time in its history, and again in 2008, Canada welcomed more temporary than permanent residents. While the number of international students who initially entered the country in 2008 represented a 20 percent increase over 2004 (in part because Canada's post-secondary educational institutions are making a concerted effort to attract them), the highest increase was in the number of temporary foreign workers. Compared with the number of immigrants entering

Canada under the economic class (rather than all categories of permanent immigrants, which would include the family class and the refugee class), the number of temporary foreign workers entering the country was higher over the 2006-08 period. This is all the more significant considering that the economic class includes both the single applicant and accompanying family members, whereas many temporary foreign workers enter the country alone (CIC 2009d, 6, 62).

Between 2002 and 2008, the number of temporary foreign workers present in Canada (on December 1) rose by 148 percent, from 101,259 to 251,235, while total entries of these workers — that is, the sum of initial entries and re-entries — rose by 73 percent, from 110,915 to 192,519. Although the number of temporary foreign workers has grown in all provinces (with significant numbers in western Canada), the increase has been most pronounced in Alberta. The stock of temporary foreign workers in that province grew between 2004 and 2008 by 338 percent from 13,167 to 57,707 (including a 55 percent jump from 2007 to 2008); total entries of these workers rose by 270 percent from 10,550 to 39,073. By contrast, permanent immigration to Alberta over the same period grew by 47 percent from 16,475 to 24,195 (CIC 2009d, 26, 62-5). It is not unreasonable to estimate that, before the economic downturn, there were more than 60,000 temporary foreign workers residing in Alberta. At 1.6 percent of the population, temporary foreign workers in Alberta outstrip the proportion in every other province, where they range between 0.2 percent and 0.7 percent (except in British Columbia, the only other province where the proportion exceeds 1 percent (Alberta Federation of Labour 2009, 8).

Although these numbers are not surprising, as the intent of both federal and provincial governments has been to increase the overall number of temporary foreign workers entering the country, workers in lower-skilled occupations account for the largest percentage of the increase, a shift strongly associated with the expansion of the TFWP to make it easier to hire lower-skilled workers. But before going to the heart of the matter, it is important to locate the temporary foreign worker programs within the mosaic of the different existing TFWP.

Canada has long had programs — general or sector specific — geared to bringing in migrant workers on a temporary basis. The flagships of Canada's temporary migration programs, the Seasonal Agricultural Worker Program (SAWP) and the Live-in Caregiver Program (LICP), traditionally have been the focus of major attention within policy and academic circles. Some praise the programs as an effective way to fill shortages in the labour market with a low overstay rate. Others denounce them because they place too many restrictions on workers' mobility and give too much power to employers, thus increasing the vulnerability of workers hired under these programs. Although the SAWP and the LICP have remained relatively stable over the years, the TFWP has undergone seismic changes in its purpose, size and target populations — and yet, until now, it has operated largely below the radar of public debate.

The TFWP came into existence in January 1973 (Department of Manpower and Immigration Canada 1975, vol. 2, 186). It was initially targeted at specific groups such as academics, business executives and engineers — in other words, people with highly specialized skills that were not available in Canada. However, employer demand for workers to perform jobs requiring lower skill levels, notably in the oil and gas and construction sectors, prompted the federal

government to introduce in July 2002 the Pilot Project for Hiring Foreign Workers in Occupations that Require Lower Levels of Formal Training (referred to hereafter as the low-skill pilot project). Low-skill jobs are those defined as requiring skills classified at the National Occupational Classification (NOC) C and D levels.[3] The requirement for admission via this pilot project is a high school (secondary school) diploma or two years of occupation-specific training (NOC C), although many of the temporary foreign workers admitted under it simply are given a short work demonstration or on-the-job training (NOC D). Changes to the pilot project were introduced in February 2007 to make it more attractive to employers. For example, work permits, initially valid for 12 months, were extended to 24 months. In addition, the Expedited Labour Market Opinion (e-LMO) Pilot Project was introduced in September 2007 to accelerate the application process in 12 "occupations under pressure" in Alberta and British Columbia, whereby complete applications from employers who qualify to participate are processed within about five business days of Service Canada's receiving them. In 2008, 21 new occupations were added to the e-LMO Pilot Project, including low-skill positions in construction, hospitality, food and beverage services and residential cleaning (HRSDC 2009d).

Since the TFWP is driven by employer demand, neither it nor the low-skill pilot project is governed by quotas. As a result, the number of LMOs issued under the low-skill pilot project was 66,632 in 2008, 11 times the number three years earlier; of these, Alberta accounted for 63.9 percent (HRSDC 2009f). However, the statistics provided by Human Resources and Skills Development Canada (HRSDC) on LMOs do not necessarily correlate directly with those from Citizenship and Immigration Canada (CIC). The reason is that, while an LMO is issued by HRSDC/Service Canada and provided to CIC and communicated to the employer, the decision to issue a work permit rests with CIC, which might not issue permits for all temporary foreign workers who have an employment confirmation. In addition, there might be a delay between the date of confirmation and the date on which a foreign worker obtains a work permit and/or enters the country.

These statistics nevertheless tell us something important about the increasing reliance by employers on the low-skill pilot project to fill jobs in a range of different sectors. As a result of this trend, a higher proportion of lower-skilled workers have entered Canada since the inception of this pilot project. Statistics published by CIC based on the number of work permits issued at the port of entry reveal that NOC C and D occupations accounted for the largest increase in the overall number of temporary foreign workers. In 2002, 57 percent of all temporary foreign workers were in skilled occupations (NOC 0, A and B occupations), while only 26.3 percent were in lower-skilled occupations. In 2008, however, the proportions had shifted to 36.8 percent skilled and 34.2 percent lower-skilled workers; by far the largest increase was in NOC D occupations, which accounted for only 1 percent of the workforce in 2002 but 8.8 percent in 2008 (CIC 2009d, 66).

The shift in occupation classifications toward lower-skilled occupations is particularly strong in Alberta. In 2002, 53.5 percent of all temporary foreign workers were in skilled occupations, while just over 26 percent were in lower-skilled occupations. By 2007, this had shifted to 39.9 percent in skilled and 40.8 percent in lower-skilled occupations. It is worth noting

the category "level not stated," which refers to about one in five temporary foreign workers. The Alberta Federation of Labour explains: "Much of this category includes the family members of foreign workers accepted into the TFWP, and of which a large proportion are working in low-skilled occupations" (2009, 10). It is not unrealistic to suggest, therefore, that between 40 percent and 55 percent of temporary foreign workers were actually in lower-skilled occupations. NOC D occupations accounted for the largest increase, from 1.2 percent in 2002 to 17 percent in 2008 (CIC 2008d, 85).

Paralleling the shift in occupational status is a change in the source countries of temporary foreign workers. Overall, the proportion of such workers from Asia and the Pacific has increased, while that from Europe and the United States has dropped. In skilled categories, however, almost 70 percent still originate in Europe (mostly the United Kingdom), the United States and Australia, while almost 60 percent from Asia and the Pacific and 85 percent from the Americas (outside the United States) are in the lower-skilled categories (Sharma 2006, 129; Trumper and Wong 2007, 150-60). In Alberta, the top five source countries for foreign workers in 1998 were (in order): the United States, the Philippines, Japan, the United Kingdom and Australia; by 2007 the list had changed to the Philippines, the United States, the United Kingdom, Mexico and Australia, with India following closely in sixth place. This increase in workers from developing countries raises some concerns about whether enough is being done for the migrant worker who may face more significant language and cultural challenges than would a worker from the United States or the United Kingdom. In addition, workers from developing countries are more likely to be members of visible minorities, raising issues of racism that the Alberta Federation of Labour claims are a greater concern today than a decade ago (2009, 11).

Since Canada is developing new policies to attract an increasing number of temporary foreign workers, especially the lower skilled, it is important to examine the legal status of such persons. While Canada wants temporary foreign workers to fill jobs on an ongoing basis, in fact the skilled are welcome to settle permanently but the lower skilled are expected to leave when their work permits expire, "requiring employers to recruit and train other temporary workers to replace them" (Alboim 2009, 44). Yet, experience with labour migration policies in Europe reveals that policies aimed exclusively at ensuring the eventual departure of temporary foreign workers have been unsuccessful in practice. Germany's guest worker program is perhaps the best known and most frequently cited example: despite a stop to official recruitment in 1973, a significant number of guest workers chose to remain in Germany permanently. As Cholewinski explains:

> *Labour migration was perceived as an essentially temporary phenomenon and migrants were not expected to remain in countries of employment and eventually integrate and settle there. Clearly, however, this policy approach, based on a temporary system of labour migration, which by definition discourages integration, did not work because the total foreign population in western European countries increased overall rather than decreased, as many labour migrants failed to return to their countries of origin and their families came to join them in their newly adopted homelands. Although this trend demonstrated that settlement in these countries was indeed taking place, this process was often a difficult one fraught with numerous...problems experienced by persons belonging to these foreign populations as well as discrimination in many important spheres of life, which persist to this day.* (2004, 81)

In line with the above considerations, the main objective of the current study is to establish whether the rules relating to the legal status of temporary foreign workers admitted for employment in Canada are structured in such a way as to assist eventual integration in the country of employment, or whether they discourage or even prevent such integration. The starting point of our analysis is that labour migration may well be perceived as a "temporary" phenomenon, and limiting the stay of the temporary foreign worker may well be presented as a way to confirm the "temporary" nature of the TFWP. However, since the need for such workers is ongoing, not all who make their way to Canada on a temporary basis will leave the country as expected (Ruhs 2006; Nakache and Crépeau 2007). Thus, we certainly do not take for granted that all temporary foreign workers want to immigrate to Canada, but we are interested in assessing the real opportunities for integration in Canada for those who commit to this country for several years and who may legitimately wish to settle permanently here.

According to Cholewinski, there are three different policy perspectives on the legal status of temporary foreign workers: (1) the temporary migrant is offered the opportunity to remain and integrate in the country of employment; (2) the official scheme is indifferent to the temporary migrant's future position in society; it is left to the worker or the employer whether or not to encourage integration or participation in the social or political life of the country; and (3) the aim of the official rules is to prevent the integration of the temporary migrant, who is admitted for employment in the country only for a designated period of time (2004, 6).

One major aspect of integration concerns the rights of temporary foreign workers in several fields, including employment; housing; health; family unity; access to vocational training, language and integration courses; trade union rights; as well as the possibility to acquire a more secure residence status while in the country of employment (Cholewinski 2004, 7). To determine in which policy perspective Canada is situated, our research with respect to Canada in general and Alberta in particular focuses on two main issues: (1) employment-related rights and the realization of workplace rights for temporary foreign workers; and (2) family accompaniment and access to permanent residency from within. While analyzing the legal treatment of and legal status granted to lower- and higher-skilled temporary foreign workers, we have taken into consideration the fact that conditions of admission may well determine (or at least modify) their legal status.

The research questions we address in this study can be summarized as follows. With respect to the employment-related rights of temporary foreign workers, first, what is the duration of the work permit and the possibility of an extension, and what rights do workers have to change their job, employer or employment sector? Second, do temporary foreign workers have a right to claim unemployment benefits and, if so, under what conditions? Is there a period for which unemployment benefits will be paid, and is there a period of unemployment after which temporary foreign workers may face expulsion from the country? Third, what protections do temporary foreign workers have at work in terms of the enforcement of employment standards and the ability to claim workers' compensation?

With respect to family unity and access to permanent residency, first, are family members permitted to join temporary foreign workers and, if so, which members? Is family accompaniment

subject to conditions? Second, can workers acquire a more secure status after a few years, and how? Third, can workers acquire a permanent resident status independent of employment?

In addressing these questions, we attempt to explore the potential long-term impacts of the most recent policy changes to the TFWP. In other words, we compare Canada's short-term economic needs (which are employer driven) with migrants' long-term perspectives of integration (which are based on their best opportunity to integrate).

The main difficulty we encountered was in gaining an understanding of temporary foreign workers' rights in both law and practice. There are three major reasons for this.

First, the administration of the TFWP is complex and confusing. According to the *Constitution Act, 1867*, immigration is a matter of shared federal-provincial jurisdiction. In short, the Parliament of Canada may make laws with respect to "aliens," "unemployment insurance" and "criminal law," whereas "civil rights" are under the authority of provincial legislatures — meaning that provinces govern, for example, employment rights, health care, education and housing.[4] Thus, while the federal government regulates the entry and stay of temporary foreign workers, many of their protections, with the exception of employment insurance (EI), are covered by provincial laws. Given that the TFWP falls under the jurisdiction of the federal and provincial governments, each of these players is somewhat restricted in its ability to resolve various challenges within the program. For example, the provinces' power to legislate work-related protections is limited by federal restrictions on temporary foreign workers. Moreover, while the federal government might be better equipped to protect such workers from exploitation, it is the provinces that have jurisdiction over the workers' employment rights under the Constitution. Finally, when a temporary foreign worker has a concern or a grievance, the particulars of the issue dictate the path to resolution, whether it is the courts, a provincial administrative body (such as an employment standards officer or workers' compensation board), a federal administrative body (such as CIC) or a public or private social service. All this makes it hard even for a legal expert to navigate through the appropriate channels.

Second, even if there is no apparent distinction on paper between, for instance, the employment rights of temporary foreign workers and those of Canadian citizens or permanent residents, these rights do not always transfer well into practice. Temporary foreign workers may experience additional hurdles: inexperience with the Canadian legal and social systems, limited opportunity for permanent immigration, language barriers, misleading employer-provided information, and self-censorship to protect their jobs and threats of deportation, among others. Furthermore, the rights held out as protection for all may be of little value to the temporary foreign worker who is in the unique employment situation of needing a work permit that has legal restrictions.

Third, the policy changes to the TFWP that have been implemented recently make an up-to-date analysis of the relevant law and policy extremely difficult. For example, there is some discrepancy among legislation, jurisprudence and internal, unpublished policy regarding EI for temporary foreign workers, as we show in this study.

In light of these difficulties, we conducted interviews in spring 2009 with a number of people involved in the TFWP in order to clarify and confirm our research findings and to indicate the disconnect between what is stated in law and what happens in practice.

As we have noted, the legal treatment temporary foreign workers may expect to receive in Canada and their chances for integration and settlement depend on their employment-related rights and their concrete opportunities to achieve a more secure status, among other factors. We thus begin with an overview that situates the TFWP in the more general context of the changing face of economic immigration to Canada. We then deal with issues related to protection against unemployment and against expulsion for workers who have been laid off. This is followed by a discussion of the rights of temporary foreign workers in the workplace, with a particular focus on the enforcement of employment standards and workers' compensation in Alberta. We then describe and comment on the barriers to attaining permanent residency from within for lower-skilled workers. In the conclusion, we summarize the main findings of the study, identify some mechanisms designed to better protect temporary foreign workers and evaluate whether and how recent governmental initiatives will lead to better protection for such workers.

The Changing Face of Economic Immigration to Canada

The expansion of the TFWP must be situated within the context of other recent federal policy shifts that, when put together, reveal something important about the trends regarding Canada's immigration objectives. These changes can be summarized as follows: restrictions on the Federal Skilled Worker Program (FSWP); the growth of provincial nominee programs (PNPs); and new opportunities for permanent residency from within for some temporary foreign workers and some students with a Canadian degree. It is necessary to say a few words about these changes.

First, there has been little debate on how these changes actually affect the ability of the immigration system as a whole to meet Canada's long-term economic needs. Second, it is not possible to assess the numerous impacts of the changes to the TFWP and the role temporary foreign workers are currently playing in Canadian society without first understanding the changing framework of economic immigration to Canada. This framework reveals a new approach to economic immigration to Canada that, while modifying the design of existing programs and justifying the creation of new ones, has implications for the integration of migrants and immigrants, and affects their understanding of workplace expectations and of their rights and obligations in this country.

That brings us to the third point: all these recent changes are interconnected. Temporary migration in Canada, for instance, increasingly has become a "transmission belt" to permanent immigration, which, as we show later, has affected indirectly the way the TFWP works and interacts with other programs for immigration to Canada (Alboim 2009). In June 2008, Parliament passed Bill C-50, which, under section 87.3 of the *IRPA*, gives broad discretionary power to the minister of citizenship and immigration to issue instructions to immigration officers for the processing of applications of economic and family class immigrants. In

November 2008, ministerial instructions were introduced under this authority to address some of the strongest criticisms from employers regarding Canada's immigration points system in general and the skilled worker class in particular. This system, which allows individuals to enter Canada as permanent residents, had long been considered not sufficiently responsive to short-term labour market demands. Criticisms included, among other things, the lack of credit given to those workers with skills or competencies in demand, the large backlog of applicants seeking permanent residency as federal skilled workers, and the major challenges many immigrants faced in gaining meaningful employment in jobs that matched their education, skills and experience (Kitagawa, Krywulak, and Watt 2008, 12-15). The November 2008 instructions limited eligibility of applicants in the skilled worker class to three categories: (1) applicants in 38 "high-demand" occupations in managerial occupations, professional occupations and the skilled trades; (2) applicants with prearranged employment; and (3) applicants who have already legally resided in Canada as students or temporary workers for at least one year. Applications that do not fall within one of the three categories are not processed, thereby forcing ineligible applicants (those who would have otherwise qualified under the existing points system) to look for alternative immigration programs (CIC 2008b; Government of Canada 2008).

The Auditor General of Canada, however, has criticized CIC for having developed ministerial instructions that lack a well-defined strategy (Office of the Auditor General of Canada 2009, 19). Certainly, it is too early to assess the effectiveness of the changes introduced under these instructions from the perspective of labour market needs. However, concerns have been raised that immigrants with skills are being turned away or directed toward provincial or temporary foreign worker programs, which, as we discuss further below, increasingly are employer driven. Moreover, the exclusionary short-term occupation focus has been criticized for not serving Canada well in the long term, since entrants are not primarily chosen on the basis of their "human capital," which emphasizes education and language ability and which is "the best predictor of success, especially in terms of being able to adapt to a changing economy" (Alboim 2009, 24, 47).

While limiting applications under the skilled worker class, the federal government has expanded immigration opportunities for those who are already residing in Canada as students or temporary skilled workers. Under the Canadian Experience Class (CEC) (created in September 2008), temporary foreign workers with at least two years of recent full-time skilled work experience in Canada (those with NOC skill levels of 0, A or B), and foreign students with Canadian degrees and at least one year of full-time skilled work experience in Canada, may apply for permanent residence from within Canada. Unlike the FSWP, the CEC does not use a points system; rather, the program looks at what work experience or what type of education the applicant already has. The business sector welcomed this development as a positive shift from a points system that attempts to predict the employability of potential immigrants to one that relies on actual employability and is able to better address labour market needs (Canadian Chamber of Commerce 2008). Yet the measure has also been severely criticized for giving preference to people who come to Canada on a temporary basis before they can apply for permanent residence, and for devolving the responsibility

for the selection and initial settlement of future citizens to employers and post-secondary institutions. The number of permanent residents admitted under the CEC is expected to grow from 5,000 in 2010 to 26,300 in 2012, surpassing the number of permanent residents admitted under the FSWP (Office of the Auditor General of Canada 2009, 12). This is a clear indication of a change in Canada's economic immigration policy, which increasingly seeks to attract and retain skilled temporary migrants.

In recent years, the provinces have also become more involved in immigration management to attract and retain newcomers. This is due to the unique demographic and economic challenges the provinces face. In Nova Scotia, for example, immigrant arrivals dropped by nearly 60 percent between 1995 and 2003, raising concerns about decreasing population and insufficient labour force numbers (Nova Scotia 2005). In addition, since provinces have manifested some frustration with the FSWP backlog and eligibility criteria under that program's points system (Alboim 2009, 5), another important element of recent policy shifts in economic immigration is the expansion of PNPs.

A PNP allows provinces to promote and have a say about immigration into their territories, while partially preserving federal control over the process. Provinces are allowed to tailor their own selection criteria and decide whom they would like to nominate for immigration. The federal government, however, maintains control over PNP admissions by stipulating that all nominated applicants must meet federal security, criminality and health requirements, and that CIC holds authority over issuing permanent resident visas to all approved applicants.

To date, all provinces (except Quebec[5]) and one territory (Yukon) have negotiated PNP agreements with the federal government. Although they are a relatively new phenomenon — the first PNP was introduced in 1998 — admissions under PNPs have grown quickly, from approximately 500 in 1999 to 22,000 in 2008. To accommodate continuing growth of these programs, CIC anticipates admitting up to 40,000 provincial and territorial nominees annually between 2010 and 2012 (CIC 2009a, 9-10, 15; Office of the Auditor General of Canada 2009, 12). In addition, in 2007, the federal government signed framework agreements with Alberta and Nova Scotia that are of indefinite duration and place no limit on the number of immigrants who can be nominated through these provinces' PNPs (CIC 2008a, 10-13, 18).

PNPs can be seen as a departure from the federal selection of immigrants, which prevailed until recently for all provinces except Quebec.[6] While PNPs are believed to have the potential to address the uneven distribution of newcomers in Canada (Carter, Morrish, and Amoyaw 2008), their intention — to meet the specific economic needs of provinces — raises some problems. For example, most PNPs are short sighted, focusing on immediate labour market needs and on qualifications for specific occupations rather than on human capital characteristics of applicants — that is, the flexible skills needed to adapt to a changing economic environment (Alboim 2009). Moreover, even if PNPs are lower-skilled temporary foreign workers' best bet to obtain permanent resident status, they come with their own sets of limitations.

The Administration of the Temporary Foreign Worker Program

An understanding of the legal regime that regulates the entry and stay of temporary migrants admitted into Canada, to which we now turn, is essential in order to evaluate the TFWP. The variety of players and policies involved in the program has the potential to create communication and protection gaps within the day-to-day administration of the program. Moreover, an administrative element that is a major area of concern is the restrictive nature of the work permit, which limits workers' ability to change employers or to receive EI.

Overlapping policies in administering the TFWP

One significant problem with the administration of the TFWP is the overlapping policies that are involved. For one thing, the program's administration is split among three key federal players, which creates opportunities for miscommunication and confusion. For another, the lack of an overall mechanism to oversee the TFWP is problematic. For example, even though regulation of recruitment agencies is a provincial matter, the lack of a consistent set of rules across the country to regulate illegal recruitment practices prevents any strong action to ensure that temporary foreign workers are equally protected against such unethical practices.

Communication gaps among the three federal players

Under the legal framework of the *IRPA* and the Immigration and Refugee Protection Regulations[7] (*IRPR*), three federal departments administer the TFWP. HRSDC administers the "employment validations" (also referred to as "employment confirmations") and deals exclusively with employers, CIC deals with the workers and matters pertaining to admissibility requirements, and the Canada Border Services Agency (CBSA) is responsible for immigration processing at the port of entry and has the final say on whether a worker can enter Canada. All temporary foreign workers admitted under the TFWP must have an approved job offer and a work permit before arriving in the country.[8]

To better illustrate the interaction among these three chief players, let us look at the extensive process by which a temporary foreign worker enters Canada. First, an employer must apply to HRSDC to get an LMO regarding the impact the entry of a foreign worker will have on the Canadian labour market. HRSDC considers the terms and conditions of the recruitment (such as the wages and working conditions offered). It also ensures that the temporary foreign worker will not be taking a job that a Canadian could perform (HRSDC 2009c; *IRPR*, section 203).[9] HRSDC also requires that all applications under the low-skill pilot project must have a specific contract, signed by both the employer and prospective temporary foreign worker, that outlines the employer's obligations toward the worker, including wages, working conditions, roundtrip transportation costs, medical coverage, assistance in finding suitable accommodation and payment of all costs related to hiring the worker (HRSDC 2009d; CIC 2010b, 34). LMOs for high-skilled occupations are valid for up to three years, while LMOs for NOC C and D occupations are valid for up two years.

Once the employer obtains a positive LMO from HRSDC, the prospective employee then must apply to CIC for a work permit. Applications for work permits generally are made outside Canada; however, there are situations where a work permit may be obtained at the port of

entry or within Canada.[10] The immigration officer will not issue a work permit unless satisfied that the applicant is able to perform the work sought (this may include the ability to communicate in English or French) and will leave Canada at the end of the authorized period.[11] When assessing work permit applications, CIC immigration officers are expected to exercise their discretionary "judgement in making well-informed decisions" (CIC 2010b, 35). The decision to issue a work permit, therefore, is made on a case-by-case basis. At this stage, before undertaking work in Canada, workers have to undergo a medical exam if they intend to work in a field where the protection of public health is essential, or if they intend to be in Canada for more than six months and have resided in a designated country for more than six months in the year preceding their arrival in Canada.[12]

Finally, the CBSA officer at the port of entry has the final say on whether an individual can enter Canada, and the prospective worker must also satisfy the officer that he or she has the ability and willingness to leave. Thus, a positive LMO and permission to work in Canada are not determinative of admission, since the CBSA officer still has to review all immigration, identity and work-related documents before printing off the actual work permit and letting the person enter the country.

In a recent publication, CIC admits that some cases may fall into an "apparent grey area" because of the fact that the TFWP relies on the close cooperation of different federal departments, and recommends better communication between HRSDC and CIC/CBSA:

> *Officers are encouraged to contact HRSDC in cases where, for example, a bit more detail regarding the job offer would assist the decision, and likewise are encouraged to respond to HRSDC queries in a timely manner. Ultimately, closer communication will result in quicker, more efficient service which benefits the clients (Canadian employers and the foreign workers) and the two departments. CIC/CBSA officers are provided with a list of every HRSDC foreign worker officer and their contact information, and likewise HRSDC officers have been provided the contact information for CIC officers.* (CIC 2010b, 36)

Certainly, communication between HRSDC and CIC/CBSA is critical for clarifying some of the grey areas unique to the TFWP. It is particularly important in an immigration law context, where wide discretionary powers are granted to CIC and CBSA officers and, therefore, the risk of making a mistake is not minimal, and mistakes may lead to detrimental consequences for the prospective worker. Interestingly, several of our interviewees indicated that communication between CIC and HRSDC has increased over the years. They also noted, however, that there are still significant communication gaps between CIC and CBSA, as officers of the two agencies have very different perspectives and approaches to their immigration work.

Abusive recruitment practices

With the growth of the TFWP, employers are increasingly dependent on recruitment agencies — also known as "labour brokers," "employment brokers" or "recruiters" — to help match them with appropriate temporary foreign workers. Too often, however, instead of legitimately earning their fee from employers, recruiters charge prospective foreign workers for work placement, which is illegal under several provincial laws. In Alberta, for example, workers are charged recruitment fees ranging on average between $2,000 and $8,000, with some approaching $20,000.[13] In addition, recruiters sometimes engage in illicit conduct, such as

charging a fee to bring the worker to Canada for a job that never existed, no longer exists when the worker arrives, or exists for only a short time before the worker is laid off. Recruiters have also disseminated misinformation, such as exaggerating the amount a worker can expect to earn in Canada, and providing incorrect information about the worker's opportunities to obtain permanent resident status once in Canada. Furthermore, recruiters often charge very high fees for other services, such as obtaining an extension of a work permit (House of Commons Canada 2009, 31).

Regulation of recruitment agencies is a provincial matter, meaning there is no consistent set of rules across Canada, but only some provinces regulate recruiters. In Alberta, employment agencies (which include recruiters) must be licensed and are prohibited from charging foreign workers fees for finding them employment, although they are allowed to charge reasonable settlement fees for services such as helping new entrants find apartments, figure out bus routes and obtain health insurance cards.[14] Several interviewees noted that the distinction between "settlement fees" and "recruitment fees" is extremely confusing for the temporary foreign worker, and recruiters often charge fees for settlement services that are, in fact, for recruitment.[15] In addition, there is no effective enforcement of the rule prohibiting recruitment fees. The system is complaint driven, and temporary foreign workers are less likely than others to file a complaint against a broker, due to lack of awareness of their rights, self-censorship to protect their jobs (especially now that LMOs are so difficult to obtain) and fear of reprisal. Perhaps most important, temporary foreign workers need to see that the benefits of speaking out outweigh the risks. Yet, too often, brokers are difficult to track down and clear evidence of illegal activities — in the form of paperwork, for example — is impossible to gather. As a result, the vast majority of investigations undertaken by Service Alberta result in no formal action or are abandoned due to "lack of evidence" or inability to pursue the broker (Alberta Federation of Labour 2009, 12). Brokers also circumvent provincial legislation by incorporating in a province other than the one in which they primarily operate, or by incorporating in a foreign jurisdiction and demanding payment in the country of origin, making it impossible for governmental officials to prosecute them because of a lack of jurisdiction.

Some efforts at improvement are being made in Alberta. In its 2009 *Temporary Foreign Worker Guide for Employees*, the Alberta government explains: "Employment agencies charge the employer a fee for recruiting each worker. This fee is negotiated between the employer and employment agency. The employer will not be able to recover the cost of this service from the employee. Any agency that indicates this is possible is wrong. Fees cannot be charged to potential or recruited workers to find a job" (Alberta 2009d, 10). In 2008, Alberta also issued a guide for employers that use employment agencies (Alberta 2008b). However, despite such worthwhile steps to provide information to both employees and employers about the dangers of unscrupulous agencies, the onus still falls on employees to make a complaint and on employers to monitor the performance of the agency. Yet, in about 30 percent of cases in Alberta, the employer is not aware of the fact that recruitment agencies are charging workers fees for recruitment.[16]

In October 2008, Alberta and the Philippines signed a memorandum of understanding (Alberta 2008a) aimed at easing labour shortages and improving the entry of Filipino workers into the province (Saskatchewan, Manitoba and British Columbia also entered into similar

agreements with the Philippines the same year). The agreement contains a strictly stipulated policy against charging any recruitment fees to Filipino workers who want to come to Alberta. It also contains information about fees charged by employment agencies. The Philippine Overseas Employment Administration is working in collaboration with the Alberta government to target unscrupulous recruitment agencies and to warn overseas job applicants about them (Alberta 2008b). Such bilateral agreements clearly help protect temporary foreign workers against illegal recruitment fees, and their use should be expanded; however, Alberta is not pursuing any further agreements at this time.

In April 2009, Manitoba implemented legislation that strictly prohibits charging fees to workers as part of the recruitment process.[17] The legislation also strengthens enforcement provisions to ensure that employers and third-party recruiters comply with these requirements. Employers are required to register with the province before the recruitment of temporary foreign workers begins, and they are liable for recruitment fees charged to a worker by an unlicensed recruiter or if recruiting directly. Third parties must provide an irrevocable letter of credit in the amount of $10,000 before they can receive a licence, the money being used to return the illegal fees to the foreign worker should it be found that the worker was charged by a licensee. The province also may refuse or revoke a licence and investigate employers and recruiters on behalf of workers. Through increased monitoring, the new legislation facilitates employers' worker recruitment activities in an ethical and orderly manner and, as such, is a good example that other provinces should follow.

Although regulation of recruitment agencies is a provincial matter, the federal government could do more to protect temporary foreign workers against unscrupulous labour brokers. In its proposed regulatory changes, Ottawa has suggested the introduction of factors to determine the "genuineness of job offers," such as "the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work...The current regulations do not set out any factors on which the genuineness assessment is to be made. Therefore, the prescription of such factors is [likely] to lead to a more systematic and rigorous approach to the assessment" (Government of Canada 2009b). To ensure that the genuineness of job offers is systematically verified, CIC and HRSDC have developed a new information-sharing agreement. In addition, new interdepartmental working groups have been established "to ensure better communication and coordination of program development and implementation" (Office of the Auditor General of Canada 2009, 32).

The proposed measures are certainly a step toward more involvement on the part of the federal government, but there are other ways for it to be more proactive on that front. First, Ottawa could inform workers abroad of the legal provisions regarding recruiters in the province in question and use the Internet to provide information to employers about best practices of recruitment agencies, providing warnings about unethical practices and targeting countries where these problems occur most often. Second, some federal law provisions already exist under which illegal recruitment practices can be prosecuted. Labour brokers

who seek to bring in temporary foreign workers without the appropriate documents, for instance, are engaging in practices that are illegal under section 117 of the *IRPA*. In September 2008, two labour brokers in Ontario were found guilty of human smuggling under this provision, sentenced to three months' house arrest and fined $65,000. In publicizing this conviction, the federal government asserted that "there must be zero tolerance for exploitation, mistreatment or wrongdoing by unscrupulous employers or recruiters" (HRSDC 2008). Although the line between smuggling (organizing the entry of unauthorized workers) and trafficking (engaging in fraud or coercive behaviour) is complex and difficult to draw in practice (Bhabha 2005), trafficking offences are punishable by a maximum of 14 years' imprisonment or even life imprisonment under aggravated circumstances, under criminal law, and by a fine of up to $1 million or life imprisonment, or both, under immigration law.[18] However, attention directed at human trafficking so far has tended to focus mainly on trafficking for the purposes of prostitution (Fudge and MacPhail 2009, 23).

In addition to being subject to existing legal provisions, recruiters could also be held accountable by the enforcement of certain professional standards. Often, immigration consultants who are not lawyers nevertheless offer legal advice and information to individuals involved in the immigration system, whether potential foreign workers or Canadian employers. Authorized immigration consultants must belong to the Canadian Society of Immigration Consultants (CSIC), a self-regulating agency established in 2004 to protect consumers of immigration consulting services. Authorized immigration consultants who provide misleading advice regarding Canadian immigration law to a foreign worker will be referred to the CSIC. Yet the CSIC is not empowered to prosecute unethical consultants under immigration or criminal legislation. In addition, there is no incentive for immigration consultants to join the CSIC: membership fees are high, and there are no practical consequences for consultants who fail to join and, in effect, remain unauthorized. Indeed, the vast majority of immigration consultants are not members of the CSIC and could be reported to the appropriate provincial law society for practising law or providing legal services without a licence, but only if they provide the advice or legal services in Canada (House of Commons Canada 2009, 36).

Although it is within the federal government's jurisdiction to investigate and penalize unauthorized consultants, Ottawa has not expressed any interest in becoming more involved in the regulation of the immigration consultant industry. The CIC Web site does provide information on how to file a complaint about immigration consultants and fraud warnings (in 15 languages), but there is no information guide for temporary foreign workers about the dangers of using unauthorized consultants. The roles of the various government departments in disseminating this information, protecting the public and regulating the industry are still unclear and, in fact, the House of Commons Standing Committee on Citizenship and Immigration has recommended that all unauthorized consultants merely be referred to provincial law societies (House of Commons Canada 2009, 37).

Another related problem is that clients bear the costs of unscrupulous consultants. CIC refuses to process applications submitted by unauthorized consultants, but this policy has little effect on the consultant and serves only to punish the applicant, since the unauthorized

consultant is often paid whether CIC processes the application or not. In addition, the courts tend to be wary about claims of incompetent representation. Rarely will they find that the incompetence of the immigration consultant resulted in a breach of natural justice, because there must be clear and convincing evidence that the incompetence prejudiced the client in immigration proceedings and that the prejudice was the result of the consultant's incompetence. Thus, the courts have made it clear that applicants bear the responsibility for their incompetent counsel.[19]

Finally, given that the limited powers of oversight wielded by the federal government and CSIC apply only within the borders of Canada, it has been recommended that the federal government revise the Web sites of Canadian embassies and missions abroad to provide clear and accessible information about immigration consultants. This information should include a list of authorized representatives practising in the country. While Canada has limited power to act overseas, it is believed these steps would help reduce the negative effects of unethical consultants abroad (House of Commons Canada 2008, 11).

Since the practice of charging fees to workers continues in Alberta despite the licensing requirement and rules prohibiting such practices, Alberta should take more proactive measures to address illegal recruitment practices. While it may be impractical to expect Alberta to increase bilateral agreements with all sending countries to deal with this problem, the Manitoba legislation is a realistic and promising model. Finally, the federal government should make better use of existing legal provisions directed against illegal recruitment practices and be more involved in the regulation of the immigration consultant industry. These options respect provincial jurisdiction and clearly have the potential to reduce workers' vulnerability.

The restrictive nature of the work permit

Work permits issued under the TFWP tie each temporary foreign worker to a single employer. However, individual conditions imposed on the work permit — for instance, the location where the applicant can work, the particular occupation and the duration — vary. The restrictive nature of the work, which is employer specific, limits the rights that workers might otherwise exercise to change employers. Temporary foreign workers also might be ineligible for EI just because they are legally restricted from taking new employment (although physically able to be employed).

Impediments to foreign workers' ability to change their employment

Temporary foreign workers who wish to renew their work permit before it expires or to change any of its conditions must apply to CIC.[20] Temporary foreign workers with an expired work permit may apply from Canada to restore their status within 90 days of the expiration of the permit, but there is no guarantee that CIC will restore their status.[21] Since November 2008, there have been two application streams from within: one for renewal of a work permit with the same employer (the current processing time is 80 days) and one for changing conditions to a new employer (the current processing time is 25 days) (CIC 2008e). Workers who have applied to extend a work permit with the same employer before the expiry of their existing permit have implied status from the date on

which the application is received and can continue to work at their existing place of employment as long as their application is in process and they remain in Canada (CIC 2009g). However, workers who have applied for a work permit with a new employer are not authorized to work for the new employer until they receive the permit.[22]

Although the processing time for getting a new work permit with a new employer has been reduced significantly since November 2008, the overall waiting time for finding a new job, obtaining a new LMO and getting a new work permit can be very long. In June 2009, it took approximately six months to get both the LMO and the work permit from within.[23] In February 2010, processing times had improved somewhat, taking approximately four months: 2 weeks to advertise, 10 weeks to process the LMO and 3 weeks for the work permit.[24] (The e-LMO, however, is an exception to this time period.) Interviewees unanimously noted that the most difficult part is getting the LMO, as a result of Canada's recent economic downturn and, in response to rising unemployment, because of pressure from HRSDC on employers to hire Canadian workers. Certainly, HRSDC's job banks are available to temporary foreign workers who are looking for a new job, but no special initiative has emanated from either the federal or the Alberta government to match such workers with employers who already have an approved LMO or to assist them in finding a new job if they become unemployed or discover that there is no job waiting for them upon arrival in Canada.[25] In law, temporary foreign workers who have been laid off or lose employment are allowed to stay in Canada for the duration of their work permit, but those who are not self-supporting are expected to return home, even if their permit has not expired, so as not to be in violation of their visa.[26]

In reality, temporary foreign workers often face financial difficulty during their sometimes lengthy period of unemployment, especially if they cannot access government benefits. In response, they might resort to unauthorized employment (House of Commons Canada 2009, 25). Moreover, those who are in Canada illegally — because they have overstayed their work permit or have worked outside the restrictions of their permit — are at risk of exploitation by unscrupulous employers and of being removed from Canada.[27] In Alberta, the duration of the work permit has been reduced from two years to one, probably as a result of both the recent economic crisis and an April 2009 HRSDC decision to issue one-year instead of two-year LMOs in some regions.[28] In practice, since they are now requested to leave Canada after one year, this means that temporary foreign workers who are laid off more than six months after their arrival in Canada are not able to obtain a new work permit from within the country before their current permit expires (since it takes about four months to get both the LMO and the new permit).

To address the concerns of temporary foreign workers, the Standing Committee on Citizenship and Immigration suggests that work permits no longer be employer specific but sector or province specific (House of Commons Canada 2009, 25). Such a change would help workers to change employers and help employers to fill vacancies immediately. In addition, to reduce the time a worker spends looking for a new job, Ottawa should help them identify employers who have valid LMOs and are therefore eligible to hire.

Confusion about the right of foreign workers to receive employment insurance

The federal employment insurance (EI) program temporarily compensates workers who have become unemployed involuntarily through no fault of their own and who are making an effort to get back into the workforce. Along with the regular benefits program, EI also includes sickness benefits, compassionate care benefits and maternity or parental benefits. Temporary foreign workers and their employers make payments into EI just like Canadian workers. However, the unemployed are not entitled to benefits merely because they have paid into the plan. Rather, a claimant must have worked a certain number of hours within the last 52 weeks or since the last EI claim. This is the "qualifying period"; the number of hours depends on the regional rate of unemployment. In addition, a claimant must prove that he or she is "capable of and available for work and unable to obtain suitable employment."[29]

There are several problems with temporary foreign workers trying to access EI. The first is an obvious one: unless the worker has been employed for the qualifying period, he or she is not entitled to benefits; thus, a foreign worker who is laid off shortly after arriving in Canada most likely will not qualify for regular benefits. The second problem is that temporary foreign workers may not be entitled to receive EI because their "employer-specific" work permit restricts them from being "available for work" for other employers. This latter problem is the focus of this section.

Within the jurisprudence, being "available for work" is interpreted in terms of both a claimant's self-imposed restrictions and state-imposed restrictions, such as the restrictions on a work permit. In relation to this point, Justice Linden of the Federal Court of Appeal has written, "Availability for work is a statutory requirement and cannot be ignored by Umpires, whatever the extenuating circumstances may be."[30] Thus, according to previous jurisprudence, temporary foreign workers with restricted work permits are not "available for work." The consequences of this interpretation of the statute are illustrated by the following examples.

In 1997, Josephine Simmons, a foreign national from Ghana on a restricted work permit, was laid off from her job because of a shortage of work. She applied for EI but was denied. The umpire, Justice Jerome, affirmed the decision of the board, writing:

> *The Board recognizes that to satisfy the requirement of availability under the Act a person has to be available for work without restrictions. Although we sympathize with the claimant, here we find according to the evidence she is restricted involuntarily because of Employment Authorization which limits her to be employed by one employer only. As a result, when the employer laid off the claimant, she was restricted from finding other employment. Accordingly, she was not available for other work. The fact that the employer supports the claimant with a letter stating he will hire her back in April 1997 is irrelevant to this issue.*[31]

In another case, Jessica De Guzman worked as a nurse in Nunavut from August 2005 until November 2006. Her work permit did not expire until August 2007, and had the usual restrictions of occupation, employer and location. After losing her job, she moved to Alberta to seek employment. Her application for EI was denied, however, as she was not available for work given the restrictions of her work permit. Her appeal was dismissed since she had moved from Nunavut to Alberta and the conditions of her work permit did not allow her to work in any other province. Also, since the claimant had not sought to have the conditions of her work

permit changed at the time she claimed EI benefits, "the fact that she may have subsequently made such a request [was] irrelevant."[32]

In contrast is a decision concerning Jozef Juris, who worked as a landscape gardener until he was laid off in 1997. His claim for benefits initially was granted but soon afterward denied; then, over a year later, Justice Haddad reversed the decision and granted the claimant the EI benefits due him. By this time, Juris had obtained a new work permit. In his opinion about section 18 of the *Employment Insurance Act*,[33] Justice Haddad said, "It is not intended to apply where unavailability is imposed upon a claimant in circumstances beyond his control when the claimant is ready, available, and willing to accept employment." In his judgment, Justice Haddad also commented about the difficult predicament of the foreign worker: "The claimant in this case finds himself having to pay insurance premiums pursuant to the provisions of one federal statute and then being informed that he is not entitled to benefits because of a restriction imposed pursuant to another federal statute."[34] Apart from a couple of cases, however, the jurisprudence gives a fairly consistent message: temporary foreign workers with restricted work permits are not "available for work" as defined by the Act.[35] This message puts temporary foreign workers in a legal and financial bind: on the one hand, they cannot get EI because they are not legally available for work; on the other, once they are legally available for work — having found new employment and having applied for changes to their work permit — they are no longer eligible for EI. According to the jurisprudence, temporary foreign workers are entitled to the benefits, but only when they no longer need the help.

In contrast, the HRSDC Web site indicates that temporary foreign workers are, in fact, eligible for EI: "Temporary foreign workers are eligible to receive regular and sickness Employment Insurance benefits if they are unemployed, have a valid work permit and meet eligibility criteria, including having worked a sufficient number of hours" (HRSDC 2009b). However, the department's EI policy manual, *Digest of Benefit Entitlement Principles* (HRSDC 2009a) is confusing and engages in doublespeak as it grapples with the issue of the temporary foreign worker. The guide states that a person whose work permit expires or limits the worker to one employer cannot demonstrate availability, even if the worker is willing to seek work. However, it also states that the referee must consider the specific facts of the case, asking such questions as: "Is the individual permitted to seek work with other Canadian employers? Is their work permit renewable? Has the work permit expired permanently?" Then the guide goes on to say that a claimant who does not currently have a work permit is not necessarily barred from working, since the claimant may be able to secure a work permit as soon as employment is secured because of the type of work he or she performs. Although this section is indicated as "currently under review," the contradictory information currently provided is problematic because it is impossible to know clearly whether and under which conditions temporary foreign workers are eligible for EI. The *Digest of Benefit Entitlement Principles* certainly gives administrators the flexibility to analyze availability on a case-by-case basis. It is worth noting that higher-skilled workers and those from certain jurisdictions often have fewer restrictions on their work permits.

Interestingly, reports from lawyers and nongovernmental workers in Alberta tell a different story than the jurisprudence. Until recently, applications for EI by temporary foreign workers were denied at first instance, although the decisions were routinely overturned on appeal. Now, applications are usually accepted initially, so that no appeal is necessary.[36] And if an application is refused, a template letter is automatically submitted to Service Canada/HRSDC, asking for the decision to be reconsidered and for the entitlement to EI to be granted immediately. This procedure has always worked, at least at the Edmonton Community Legal Centre, since there has been no appeal since 2008.[37] The change is good news for temporary foreign workers in Alberta, since there is a growing recognition that they are eligible for EI benefits while their permits are still valid and they are actively looking for work. Yet EI officers in other provinces are routinely refusing benefits to foreign workers in the belief that such workers simply cannot receive them. In British Columbia, for example, the Web site of the Ministry of Small Business, Technology and Economic Development indicates that, "Unlike Canadian employees, temporary foreign workers...are ineligible for Employment Insurance benefits or provincial income assistance" (British Columbia 2009a).

Given the troubling discrepancies among legislation; jurisprudence; and internal, unpublished policies, it has become crucial that HRSDC communicate its EI policy in a more coherent manner and that it ensure consistency between the official position and the decisions rendered on specific cases.

In conclusion, the overall administration of the TFWP involves a number of key players who do not always take full responsibility for the protection and well-being of temporary foreign workers. In addition, the restrictive nature of the work permit is a contentious matter. Strict conditions on work permits dissuade temporary foreign workers from changing employers and lead them to believe, mistakenly, that EI benefits are not available to them. As a consequence, those who lose or quit their jobs can remain in Canada for the duration of their work permit only if they are able to support themselves. They can access job banks to try to find a different employer; however, given the recent economic downturn and policy changes regarding the issuance of LMOs, this option might be a difficult one. Thus, temporary foreign workers who cannot find alternative employment, who are not permitted to access EI and who cannot otherwise afford to stay are expected to go home. As we shall see, their ability to access the full employment-related rights package also depends on the kind of work permit that was first issued to them.

The Challenge of Providing the Same Employment Rights to Temporary Foreign Workers

Even though the federal government has jurisdiction over "aliens," protection of civil rights is the jurisdiction of the provinces. The Alberta government, for example, clearly states that civil rights in regard to employment extend to temporary foreign workers: "As a temporary foreign worker in Alberta, you have the same rights as any other employee in the workplace. You are protected under Alberta's employment standards, workplace health and safety, and workers' compensation legislation" (Alberta 2009d, 1). This may be true on paper, but the reality is different.

In this section, we explore how the protections provided by the employment contract, the Alberta *Employment Standards Code*[38] and workers' compensation can be limited for temporary foreign workers given the uniqueness of their situation. First, because of the complex administration of the TFWP by both the federal and provincial governments, certain rights, such as the right to return airfare — a contractual right mandated by the federal government for temporary foreign workers in the low-skill pilot project — are not enforced. Second, the available protections are, for the most part, complaint driven; thus, temporary foreign workers who do not know their rights or fear losing their jobs likely will not complain. Further, barriers such as unfamiliarity with the language and time limitations on a work permit may limit their ability to complain. Finally, workers' compensation is not tailored to the unique situation of temporary foreign workers, so limitations on work permits do not allow for a shift from one job to another. Despite some important initiatives to address the unique vulnerabilities of such workers, there is still no satisfactory enforcement mechanism in place, at least in Alberta.

The employment contract: Protection gaps

A key requirement under the TFWP is that the employer must sign an employment contract before initiating the HRSDC LMO process, and HRSDC must approve the contract before it will issue an LMO. This is to ensure that the wages and working conditions being offered the temporary foreign worker are equivalent to those that would be offered a Canadian in a similar position. The contract is a detailed job description that stipulates the terms and conditions of employment, including the minimum and maximum number of hours of work per week and the rate of pay. The employer must forward to the employee a signed copy of the contract, which the employee must then sign and present, with other required documents, at the mission abroad or at a port of entry (HRSDC 2009e).

In addition, in Alberta, the *Employment Standards Code* provides minimum employment rights that must govern the employment relationship, including wages, overtime hours and pay, vacation time, maternity and parental leave and termination pay. An employment contract may provide more advantageous terms for the employee, but its terms cannot offer less than the standard set out in section 4 of the code. In other words, an employer of a temporary foreign worker in Alberta is legally bound by the terms set out in the employment contract and by the minimums under the code. A worker may address violations either through court proceedings or through the Employment Standards complaint process.[39] On paper, these layers of protection may appear satisfactory; in practice, however, protection gaps exist for the temporary foreign worker. The best example of a protection gap is the worker's right to return airfare under the low-skill pilot project.

As explained earlier, employers of temporary foreign workers in NOC C and D occupations are required, under the low-skill pilot project, to have a specific contract, signed by both the employer and the employee, that outlines the employer's obligation toward the foreign worker (HRSDC 2009d; CIC 2010b, 34). Among the specific contract provisions, employers are required to pay for an employee's flight to and from Canada. If a worker has had more than one employer throughout the duration of his or her work permit, it is the final employer who is responsible for paying for the airfare.

What remedies are available to a worker whose employer refuses to pay for the flight home? Although the employment contract contains mandatory provisions, the federal government cannot use it to enforce the employment rights of temporary foreign workers: "The Government of Canada is not a party to the contract. [HRSDC] has no authority to intervene in the employer/employee relationship or to enforce the terms and conditions of employment. It is the responsibility of each party to the contract to know the laws that apply to them and to look after their own interests" (HRSDC 2009e). In sum, even if HRSDC officers use the contract to assist them in formulating their LMO, the department has no regulatory authority to monitor employer compliance with the employment contract (Fudge and MacPhail 2009, 18). This is so because temporary foreign workers' employment rights fall under provincial jurisdiction.

Similarly, in Alberta, the authority of the *Employment Standards Code* to address contractual violations is limited: an Employment Standards officer can intervene only when an employer has violated the code — thus, for example, an employee may launch a complaint when the employer has not paid "earnings" to which the employee is entitled. But can an officer enforce the contractual right to return airfare? One employment lawyer argues that the definition of "earnings" under the code might be broad enough to include the remuneration of airfare, since the term "earnings" includes "wages," and "wages" includes "salary, pay, money paid for time off instead of overtime pay, commission or remuneration work, however calculated."[40] Another employment lawyer, however, considers that this would be stretching the definition too far.[41] The Alberta government, in fact, confirms it is not enforcing remuneration for airfare: a 2008 letter received from the Edmonton Community Legal Centre in response to a claim for unpaid airfare states, "Since this is considered an expense, required under Service Canada's Labour Market Opinion but which is outside of the scope of Employment Standards, I am unable to enforce payment for airfare on your behalf. As discussed, you will decide whether or not to submit your claim to HRSDC...for their investigation." Representatives of Service Canada recently confirmed with the Edmonton Community Legal Centre that they would not enforce remuneration for airfare.[42]

Certainly, a temporary foreign worker might find redress by confronting a contractual violation (such as return airfare) through court proceedings, but the time constraints on a work visa might present a practical barrier to successful litigation. It takes 9 to 12 months for a case to be heard at provincial court,[43] and it is reasonable to assume that a worker who has been denied return airfare is nearing the expiration date of his or her work permit. Moreover, litigating from abroad is an onerous proposition for a worker in the low-skill pilot project.

What other options are available? A worker might pay for the flight out of his or her own pocket. A worker who cannot afford a ticket home could report to the Canadian Border Service Agency for a removal order, but the enforcement of a removal order, in most circumstances, will bar the worker from returning to Canada.[44] Or a worker, out of necessity, might remain in Canada illegally.

The result, especially for the low-skilled worker, is that although protection exists, it might be inaccessible. Both levels of government offer protections to temporary foreign workers, but

each is limited in its ability to enforce these rights. A worker who cannot afford the time or expense of litigation has only unsavoury options available, especially in the case of return airfare. This is all the more troubling since this measure was taken precisely to mitigate the "risks of similar abuse and poor working conditions" occurring with the expected growth of the TFWP (Office of the Auditor General of Canada 2009, 33).

The Alberta *Employment Standards Code* and the complaint process: Practical and legal hurdles for temporary foreign workers

Although the Alberta *Employment Standards Code* does not protect the right to paid airfare for low-skilled temporary foreign workers, it does protect other important employment rights. A worker whose employment rights under the code have been breached can launch a complaint through the province's Employment Standards office, although the process itself, in practice, might bar many from accessing this protection. Also, many of the protections are not designed to address the particular situation of the temporary foreign worker and thus may be of limited value.

Although the complaint process is free of charge,[45] temporary foreign workers find it intimidating. In a 2007 newspaper report, a spokeswoman for the then Ministry of Employment, Immigration and Industry recognized that there was a "real disincentive" for temporary foreign workers to lodge complaints, and noted that only 18 out of the 4,000 complaints being investigated came from people who identified themselves as temporary foreign workers (Harding and Walton 2007). Thus, although there is no distinction on paper among employees with respect to their right to launch a complaint against their employer, in reality temporary foreign workers find it difficult to do so.

Moreover, the bureaucratic nature of the complaint process might seem overwhelming to a temporary foreign worker. Before making a complaint to an Employment Standards officer, the worker must fill out and submit a "self-help kit" to the employer as a first attempt to resolve the situation. This step is not a formal requirement of the code, but an officer has authority to refuse to accept or investigate a claim if the worker has not first explored other means of resolving the dispute (Alberta 2009a; *Employment Standards Code*, section 83(3)). Also, a foreign worker's entitlements under provincial legislation are not easy to figure out. While Alberta Employment and Immigration makes documents available that inform workers of their rights, these documents are in English only, as are the complaint form and the instructions that accompany it. Thus, the complaint process itself could prove a barrier to foreign workers who may struggle to fill out the forms, explain adequately the breach and calculate the compensation due them.

Furthermore, the complaint process is potentially risky and lengthy. A worker who files a complaint risks losing his or her job without the possibility of new employment, whether or not the case is proven. If an Employment Standards officer believes that the worker was fired for reasons prohibited by the code, the officer must refer the complaint to a director. If the director finds the complaint has merit, he or she then may order the employer to pay the worker what is owed or to reinstate the worker. The process could be prolonged, however, by the employer's right of

appeal to an umpire. Moreover, except for certain prohibitions under the code, it is not illegal for an employer to terminate an employment contract, even one of a fixed term, as long as the contract worker has been given sufficient notice (as specified by the contract or at common law) and, at least, sufficient termination pay or termination notice, as specified under the code.[46]

Not only is the complaint process challenging for the temporary foreign worker, the protections the *Employment Standards Code* offers the worker may not be worth the risks, since the code was not designed in consideration of the peculiarities of the situation of such workers. For example, termination pay is an important aspect of the code, as a provision to bridge the financial gap between prior and new employment, but no termination pay is required if an employee has worked less than three months, and only one week of termination pay is required if the employee has worked less than two years.[47] Since the work permit of a temporary foreign worker is typically no longer than two years, this minimal institutional protection may be of little value to many such workers. The length of time it takes for an employer to get an LMO and for the restrictions on a work permit to be changed means that a single week of termination pay or notice is insufficient to fill the gap between old and new jobs for most temporary foreign workers. Furthermore, termination pay is not required for certain occupations and in certain situations.[48] While these exceptions are not unique to temporary foreign workers, only those workers are legally barred from finding immediate alternate employment. Other protections offered by the *Employment Standards Code* are also of limited value — for example, a temporary foreign worker who has been granted maternity or parental leave may not be able to return to work if his or her work permit has expired.

Even for the employer, the restrictions on a work permit might be burdensome. In the construction industry, for example, it is common for employers to lay off workers, who then simply move to the next job site for employment. The temporary foreign worker is legally restricted from making such an employment shift.[49] In other industries, such as food processing and food services, a single employer might have operations established throughout Alberta, but temporary foreign workers lack mobility and cannot be relocated as needed by the company.

In sum, because of their immigration status and their particular vulnerability, temporary foreign workers are less likely than other workers to file a complaint against their employers under the complaint-driven system of Alberta's *Employment Standards Code*. Furthermore, some of the code's protections are of little value to such workers, who are restricted from finding immediate alternative employment or whose time in Canada is limited.

Workers' compensation

Temporary foreign workers are also protected under workers' compensation legislation, but few injured workers of this type report claims to Alberta's Workers' Compensation Board (WCB), and those who do report a claim may find that the protection offered them, although "the same" as that offered every other Albertan, looks quite different because of work permit restrictions and their temporary status.

The reporting of injuries by temporary foreign workers

In Alberta, temporary foreign workers whose employer is governed by the *Workers' Compensation Act* will be covered by the Act if they suffer from a work-related injury or illness.[50] This insurance covers approximately 90 percent of all workers in Alberta. As explained above, under the TFWP, employers of low-skilled temporary foreign workers in the NOC C and D occupations must indicate to HRSDC that the worker is registered in a provincial workers' compensation program. In Alberta, however, there is no procedure for such registration. A worker whose employer is governed by the Act will be compensated for a work-related injury or illness even if the employer has failed to pay into the insurance plan.[51] At the inception of the TFWP, the WCB anticipated that the increase in claims by temporary foreign workers would be a substantial burden on the provincial insurance program. There has not been a significant increase in such claims, however, and the number of cases involving workers who now live in a foreign jurisdiction is quite manageable.[52]

According to our interviewees, there are several possible explanations for the dearth of claims by temporary foreign workers. One interviewee suggests that, out of necessity, such workers engage in safer workplace practices: since many of them do not have a comparable compensation program in their home country, they avoid situations that would jeopardize their ability to work.[53] Another interviewee, from the WCB, believes that temporary foreign workers may not be reporting injuries because they do not know of their right to compensation or because they fear they could lose their jobs.[54]

If the lack of claims can be linked to a failure to report injuries, a number of provisions and practices are already in place to help address this problem. First, under section 145 of the Act, employers are required to place posters at the workplace site informing workers of their right to compensation and alerting them to the initial steps to launch a claim: "step 1, tell your employer; step 2, tell your doctor, step 3, tell the WCB" (Workers' Compensation Board-Alberta 2009a). Although these posters are available in 15 languages, including French and English, there is no legal requirement for the employer to display them in a language other than English, even if a different language group is present in the workplace.[55] Also, although the Act prohibits an employer from obstructing (by threat, agreement, persuasion or promise) an employee from reporting a work-related injury or illness,[56] it does not protect employment status, and the WCB has no authority to order that an injured worker be reinstated.[57] Thus, temporary foreign workers who report an injury or illness may find themselves unemployed.

Second, despite the 24-month limit on initiating a claim, with a procedure for a discretionary extension,[58] the WCB takes a lenient approach to this limit so long as there remains an unbroken chain of causation of the injury or illness to the workplace. Reasons such as "I did not know" or "I would lose my job" are adequate for extending the period allowed for reporting. Furthermore, the WCB will not decrease a worker's compensation because a claim was delayed, even if the injury was exacerbated because of the delay. In relation to temporary foreign workers, compensation is also available to those who have outstayed their visas, whose visas have expired or who are living outside of Alberta (Workers' Compensation Board-Alberta 2008b), although no case seems to have been initiated outside Canada so far.[59]

Finally, there are a number of other ways that the WCB might learn of an injury if a worker does not initiate the claim. First, the employer is required to report an injury or illness to the WCB. Second, a claim might be initiated by a doctor since, by law, physicians must ask patients if their injury or illness was caused at work and must report all such injuries or illnesses to the WCB.[60]

Even though protections exist to encourage reporting, temporary foreign workers are potentially in a more vulnerable position than other workers, in part because the restrictions on their work permits limit employment to one employer, one location and one job title. Recognizing the unique vulnerability of such workers, the WCB initiated the Head's Up Campaign in 2008 to encourage them to report. Initially, the WCB made posters available only in French and English, but subsequently produced posters and other informative documents in English, French, Spanish, German, Punjabi, Chinese and Arabic, and made them available on its Web site (Workers' Compensation Board-Alberta 2009a). Account managers from the WCB are also available to help employers understand the responsibilities they owe to temporary foreign workers under the *Workers' Compensation Act*, but only at the employer's request.[61]

Despite efforts by the WCB aimed at encouraging temporary foreign workers to report work injuries, more research is needed to understand precisely why so many such workers do not report and what substantial hurdles they face in that process.

The unique immigration status of temporary foreign workers

A central goal of the WCB is to bring a worker back to a state of "pre-accident employability" (Workers' Compensation Board-Alberta 2004a, 2). Thus, entitlement to compensation lasts until the worker is physically fit to work in a job of at least equivalent pay. Ideally, after recovery, the employee returns to the same job with the same employer for the same pay. If this is not possible, yet the worker is physically capable of working in a different occupation, the WCB will provide wage-loss supplement benefits; in other words, it will "top up" the wages of the worker to match what he or she was making before the injury or illness.[62]

Clearly, the WCB is concerned only with "physical impediments to work," not with legal impediments such as restrictions on the work permit. Therefore, it is not the WCB's concern to see that necessary changes are made to the work permit so that temporary foreign workers can do modified work; rather, this responsibility rests with the employer alone. In other words, if the WCB considers that the worker is physically fit to work but in a different occupation, it will ignore the work permit restrictions and treat the worker as employable. This means the WCB will consider which job in Alberta the worker might be suited for and calculate wage-loss supplement benefits accordingly (Workers' Compensation Board-Alberta 2008a). The consequence of this policy is extremely disadvantageous and unfair to temporary foreign workers, since those who are physically able to work in a different job for comparable pay but legally barred from doing so because of the restrictive conditions of their work permit are no longer entitled to compensation under the *Workers' Compensation Act*.[63]

While the WCB for the most part ignores restrictive conditions on work permits, it will not penalize temporary foreign workers who are required to leave Alberta because their work permits will soon expire. In other words, section 52 of the *Act*, which states that the WCB has the authority to terminate compensation payments if the worker leaves the jurisdiction and the move prolongs the disablement, is not applied to temporary foreign workers.[64] When a temporary foreign worker does leave the jurisdiction, a case manager must determine if it is more cost-effective to treat the worker abroad or in Alberta (Workers' Compensation Board-Alberta 2008a). If the worker is to be assessed or treated in Alberta, the WCB will cover travel and living expenses during the worker's stay. If retraining is necessary, the case manager must also consider whether it is more cost-effective to retrain in Alberta or abroad.[65]

Whether they are treated in Alberta or abroad, temporary foreign workers must cooperate and communicate with the WCB in the rehabilitation and retraining process (Workers' Compensation Board-Alberta 2004b), and are denied compensation until they comply.[66] If they are not treated in Alberta, however, they must overcome a number of practical challenges. The onus is on them to find adequate medical care, to participate actively in a rehabilitation course of action and to keep the WCB informed of medical treatments and assessments. Moreover, if there is no agreement between the WCB and a service provider for direct payment abroad, the worker must pay for medical treatment up front and submit receipts for reimbursement to the WCB.[67]

In sum, temporary foreign workers potentially are in a more vulnerable position than other workers in reporting workplace injuries. While the WCB acknowledges this fact, it does not always adapt the rules to the unique situation of foreign workers. The numerous hurdles they face in accessing their rights and the lack of effective mechanisms to protect their rights at work are subjects of concern and, as such, undermine the legitimacy of the TFWP as a whole.

Improving employer monitoring and services initiatives

One criticism of the TFWP is that there is no thorough monitoring process to ensure that employers of temporary foreign workers are honouring contractual terms and meeting employment standard minimums. As the Auditor General rightly points out, "This lack of follow-up on job offers can have implications not only for the integrity of the programs but also for the well-being of foreign workers" (Office of the Auditor General of Canada 2009, 34). Given that the federal government has the power to authorize an employer to hire a temporary foreign worker after having approved the conditions under which the worker may be employed, it has a role to play in monitoring and compliance of employers, even if provincial governments retain jurisdiction to regulate employment standards. In other words, the federal government cannot simply "pass the buck to the provinces when it comes to enforcing temporary foreign workers' employment rights" (Fudge and MacPhail 2009, 18).

Acknowledging this, the federal government has taken a number of steps to become more actively involved in the protection of temporary foreign workers at work. First, Ottawa has signed information-sharing agreements with Alberta, British Columbia and Manitoba to support the enforcement of federal and provincial laws and standards (Office of the Auditor General of Canada 2009, 35). For example, both HRSDC and CIC have signed an agreement

with Alberta to exchange information relevant to work conditions for temporary foreign workers, with the objective of maintaining a coordinated enforcement strategy for the administration of the TFWP. This initiative was developed by the Canada-Alberta Working Group on Temporary Foreign Workers (Alberta-Canada Annex 2009), established in March 2006 by representatives of the various federal departments and provincial ministries involved in the administration of the TFWP, to discuss issues relative to the program. Since June 2009, the working group has also been in charge of overseeing the implementation of the agreement and meeting its ongoing objectives. The group, which meets every three months, seems to have succeeded in closing some of the gaps in communication between the different actors.[68]

Second, in October 2009 the federal government proposed regulatory changes that would make an employer ineligible to access the TFWP for two years if the employer was found to have provided a temporary foreign worker wages, working conditions or an occupation that differ significantly from those offered in the employment contract, and the employer also would be named on CIC's Web site (Government of Canada 2009b, section 200). These amendments are necessary because neither the immigration legislation nor the immigration regulations currently give the federal government the authority to conduct compliance reviews of employers who have not consented to be monitored; the only program of monitoring in place so far is a voluntary one from which an employer can withdraw at any time (HRSDC 2009g). However, it is still unclear which concrete mechanism will be used to monitor employers' compliance with their obligations. If the government's objective is to rely on temporary foreign workers denouncing employers, the measure is unlikely to reach its stated goal, given that temporary foreign workers will continue to be afraid of losing their jobs and being deported.

Another proposed regulatory change would place responsibility on temporary foreign workers not to enter into an employment agreement or extend the term of an employment agreement with an employer whose name appears on the list (Government of Canada 2009b, section 183(1)). Since temporary foreign workers may not know which employers have been prohibited from hiring, and since the goal is to protect workers from abuse, the employer should be held responsible for abusive practice toward a foreign worker, not the worker.

Finally, in June 2009, HRDSC created an electronic mailbox for CIC and Canada Border Services Agency staff to seek direction on specific LMOs issued by the department, as well as to report possible fraud (Office of the Auditor General of Canada 2009, 35).

Alberta has also taken some valuable steps to protect temporary foreign workers at work. For example, the province has set up the Temporary Foreign Worker Helpline, which receives between 400 and 500 phone calls a month that include, but are not limited to, employment-related complaints (Fudge and MacPhail 2009, 19). Alberta has also established temporary foreign worker advisory offices in Edmonton and Calgary, which between December 2007 and June 2009, received about 800 visits from temporary foreign workers. Workers who cannot speak English have access to services of interpreters.[69] Although these offices field questions about employment standards, work-related injuries and occupational health and safety issues, their main role is to assess problems and refer workers to the appropriate government body or settlement service.[70] In

rare instances, the offices take concrete action, but only if all other remedies have been exhausted and an emergency situation is clear — involving a serious threat at the workplace, for example. The offices do not conduct inspections themselves, but work closely with Employment Standards officers on repeated complaints about employers. These officers participate in ad hoc inspections, looking at contracts and the conditions of the workplace, and try to provide temporary foreign workers with information regarding their workplace rights.[71] Between December 1, 2007, and August 31, 2008, for example, the officers conducted 290 worksite visits, and Employment Standards Alberta received 246 complaints from temporary foreign workers, most commonly about wages, overtime and general holiday pay (Fudge and MacPhail 2009, 19).

In summer 2008, the Alberta government launched a pilot project to provide funds to nine different nongovernmental settlement service agencies in six communities in the province for the purpose of aiding temporary foreign workers (Alberta 2009d, 13, 17); previously, funding from the Alberta and federal governments had been designated for services to immigrants only. Although foreign workers who might be nervous about reporting a violation to a government agency such as an advisory office might be more likely to approach a nongovernmental agency, such agencies are not necessarily equipped to deal with complex legal issues and refer workers with employment standards issues to the advisory offices. It is still unclear whether funding for this project will continue.[72] An end to funding would be unfortunate, given the crucial role community agencies in that field play. For example, between September 2008 and June 2009, Catholic Social Services in Alberta gave nearly 800 temporary foreign workers general information or help on such topics as how to fill out government forms, how to apply for EI, how to apply for housing, employment standards and the health system. The funding of this pilot project, initially scheduled to end on March 31, 2010, was extended for three more month (until the end of June 2010).[73]

To sum up, temporary foreign workers are a vulnerable employment group, not only because of their unfamiliarity with the language and culture and lack of knowledge about their legal entitlements, but also because of the legislation under which they fall. These workers lack employment mobility and are less likely to report abusive employer practices or to benefit from the protections that exist for all workers. While certain measures have been implemented to address this vulnerability, much more needs to be done. Mechanisms to enforce labour protections need to be enhanced for workers in the TFWP. If temporary foreign workers, regardless of their skill levels, could migrate permanently, this would also be an important step, as we discuss next.

Family Unity and Access to Permanent Residency for All Temporary Foreign Workers?

The annual number of temporary migrants arriving in Canada is on the rise, a phenomenon this country shares with other traditional immigrant-receiving countries such as Australia, New Zealand and the United States. This is primarily due to two factors. One is the presence of labour market shortages and the development of intense competition for talent among these countries (Abella 2006; Shachar 2006). The other is that temporary migrants have discovered that it is "administratively simpler" to apply for and obtain permanent residence if they have already been admitted as a "temporary" skilled worker than to do so from abroad (Papademetriou and O'Neil 2004, 8).

There may be fewer hurdles involved in the administration of this two-step immigration process, but the potential impact on the rights of all temporary foreign workers and on their prospects for full integration is considerable. For example, the risk of being exploited through inferior wages or working conditions "can be quite substantial in the case of temporary admissions, where the [m]igrants may have to leave the country if they lose their job" (Papademetriou and O'Neil 2004, 11), but for immigrants who are granted permanent work and residency rights from the beginning, that risk decreases significantly because they are free to change jobs. Moreover, "Those who ultimately achieve permanent residence may not make a successful transition because they did not have access to settlement or language services when they arrived...Because two-step immigration extends the amount of time people must live in Canada before being eligible for permanent residence and then citizenship, it will also have implications on their long-term relationship to Canada" (Alboim 2009, 49, 52). An additional problem with the transition-to-permanence admission is that it is mainly directed at educated and skilled workers, offering little hope of permanent settlement and little opportunity for lower-skilled temporary foreign workers.

Legally, all temporary foreign workers, except seasonal workers admitted under the SAWP,[74] may apply for permanent residence. While temporary foreign workers are expected to leave Canada after their authorized period of stay, intent to become a permanent resident does not preclude them from being admitted temporarily, as long as the immigration officer "is satisfied that they will leave Canada by the end of the period authorized for their stay."[75] This is the "dual intent" provision, which states that temporary residents "who have, or may have, a dual intent to seek status as a worker and then eventually as a permanent resident, must satisfy the officer that they have the ability and willingness to leave Canada at the end of the temporary period authorized" (CIC 2010b, 46).

Foreign workers have four ways to change from temporary to permanent resident status from within Canada: through the LICP, the FSWP, the CEC or a PNP. All these programs are subcategories of the economic class, which also includes Quebec-Selected Skilled Workers and Business Immigrants. Among the existing temporary work programs, the LICP has a unique provision that makes it possible for live-in caregivers to apply for permanent residency after having completed two years of authorized full-time employment within three years of their entry into Canada under the program.[76]

The LICP applies only to live-in caregivers, but the FSWP and CEC are the almost exclusive preserve of skilled temporary foreign workers, while PNPs apply to both skilled and lower-skilled workers. In order to understand what this difference in treatment of skilled and lower-skilled temporary foreign workers entails, we begin by showing how existing federal programs for permanent residence actually prevent lower-skilled workers from shifting from temporary to permanent resident status. We then assess the potential of PNPs to allow access to permanent residency for lower-skilled workers, and demonstrate that, although PNPs are the most likely path to permanent residency for this group, they come with their own sets of limitations and selection criteria.

Barriers to permanent residency for lower-skilled temporary foreign workers

Lower-skilled temporary foreign workers face several barriers to attaining permanent residency from within Canada. First, it is legally impossible — except in rare circumstances — for them to change their immigration status from temporary to permanent through existing federal immigration programs. Second, conditions relating to family accompaniment and work permits for family members are more stringent for them than for skilled workers.

The exclusion of lower-skilled temporary foreign workers from the FSWP and the CEC

Both the FSWP and the CEC generally exclude lower-skilled temporary foreign workers as potential applicants for permanent residence. The FSWP is available to individuals who intend to reside in a province other than Quebec (which has its own skilled workers category) and who are "selected on the basis of their ability to become economically established in Canada."[77] Education and skilled-work experience are seen as essential components of successful integration into Canadian society (Kitagawa, Krywulak, and Watt 2008, 12). CIC explains: "Canada encourages skilled worker applications for permanent residence from people with skills, education and work experience that will contribute to the Canadian economy" (CIC 2009b).

As of November 2008, applicants in the skilled-worker class are limited to three categories: (1) persons in an occupation identified in the Ministerial Instructions (Government of Canada 2008) with evidence of one year of continuous full-time (or full-time equivalent) experience in that occupation within the past 10 years; (2) persons with a job offer from a Canadian employer; and (3) students or workers who have lived in Canada for at least 12 months immediately before submitting their application. Applications are assessed on the basis of "available funds" and the amassing of sufficient points in six selection factors to meet the pass mark. The six selection factors are education, language ability, work experience (type of occupation and years worked), age, arrangements for employment in Canada and adaptability — that is, previous study or work in Canada, the ability of the applicant's spouse or common-law partner to integrate successfully into Canadian society and the presence of relatives in Canada. Points are awarded only for work experience in skilled occupations. Therefore, unless lower-skilled workers with at least one year of skilled work experience can display high levels of formal training and proficiency in an official language, they will be unable to accumulate enough points to earn admission into Canada through the FSWP, a hurdle that, in practice, few overcome.[78]

The CEC was implemented in September 2008; its stated objective was "to make the immigration system more attractive and accessible to individuals with diverse skills from around the world and more responsive to Canada's labour market needs" (CIC 2008c). Accordingly, the program allows skilled temporary foreign workers with at least two years of full-time skilled work experience in Canada, and foreign graduates from a Canadian post-secondary institution with at least one year of full-time skilled work experience in Canada, to apply for permanent residence from within the country. Applicants under this category must also demonstrate their proficiency in either English or French and their intention to reside in any part of Canada other than Quebec.[79] While this new immigration stream permits skilled workers under the TFWP to apply for permanent residency from within Canada, those in NOC C and D occupations are not eligible.

The federal government initially anticipated that in 2009, 10,000 to 12,000 individuals would become permanent residents through the CEC channel, but only about 1,000 applications were received in 2008, and only a small increase from that level was expected for 2009. According to CIC, this was "due to changes in policy direction" that delayed the launch of the CEC (CIC 2009d, 14). For 2010, the federal government anticipates 4,700 to 5,000 applications for permanent residence through the CEC (CIC 2009a, 10) However, CIC estimates that the number of successful applicants in the CEC category will rise from 5,000 in 2009 to more than 26,000 in 2012 (Office of the Auditor General of Canada 2009, 12). These projected target levels clearly are an outcome of a new policy objective to attract and retain a much higher number of skilled foreign workers. It will be important to monitor these projections to assess the real popularity of the program.

Family accompaniment and work permits for family members of skilled and lower-skilled workers

There is no regulatory bar to having family members accompany temporary foreign workers to Canada, but lower-skilled workers are less likely than skilled workers to bring their families with them. The onus is on potential employees to demonstrate to the immigration officer that they are capable of supporting their dependents while in Canada. A key point that is considered when processing such applications is the employment situation of the applicant's spouse. While the spouse of a skilled worker is entitled to enter Canada with an open work permit — one with no restrictions on the employer — the spouse of a worker hired under the low-skill pilot project is not eligible for an open work permit and requires an LMO if applying for a work permit. This, combined with the fact that workers with lower levels of formal training generally earn less (House of Commons Canada 2009, 14), raises "very legitimate concerns regarding the applicant's bona fides and ability to support their dependents while in Canada."[80] CIC explains:

> *Applicants may wish to have their spouses and dependent children accompany them to Canada. In these cases, the officer should consider the applications as a single unit, rather than assessing each separate from the others.*
>
> *The applicant's spouse is not eligible for an open work permit and requires an LMO if applying for a work permit. Also, as temporary residents, any children may be required to pay international student rates to attend school. These costs, as well as the cost of travel to Canada, health coverage and family accommodations, may have to be borne by the applicant since the employer, under the [low-skill pilot project], is obliged to provide these only for the applicant. The onus is on the applicant to demonstrate to the officer that they are capable of meeting these expenses.* (CIC 2010b)

Since applicants have to demonstrate to the officer that they are capable of meeting all these expenses, the costs are expected to create a "significant financial barrier to accompanying dependents which will be difficult to overcome," although it is not "inconceivable that an applicant may be able to satisfy an officer that they possess the means and ability to meet the financial requirements" (CIC 2009e).[81] In other words, lower-skilled temporary foreign workers "are less likely to be able to demonstrate adequate financial support and therefore less likely to be accompanied by family members" (House of Commons Canada 2009, 14). It should be noted, however, that spouses of work permit holders who have been nominated for permanent residence under a PNP are entitled to open work permits for the duration of the principal applicant's work permit, irrespective of the applicant's skill level:

> *While there is reluctance on the part of CIC and HRSDC to support work permits for lower-skilled workers because their skills profile would not normally qualify them for permanent immigration to Canada, concerns regarding these persons going out of status and remaining in Canada illegally are mitigated when the foreign national has been nominated for permanent residence. If a province feels a foreign national is sufficiently needed in its labour market to nominate that person, then having that job filled is clearly important, irrespective of where in the NOC that particular job is classified.* (CIC 2010b, 67)

The House of Commons Standing Committee on Citizenship and Immigration has recognized that family separation "is not in the best interests of anyone — workers, their children, or Canadian society." It accordingly recommends that immediate family have the opportunity to accompany the temporary foreign worker to Canada when situations are not "truly temporary" — that is, for work permits of more than six months (House of Commons Canada 2009, 15). In addition, the committee has highlighted that all spouses of temporary foreign workers should be automatically eligible for an open work permit, noting that "[it] is a matter of fairness to extend the same opportunities to families regardless of the skill classification of the temporary worker applicant" (16). The federal government briefly addresses these points in its response to the committee's report, noting that expanding open work permits would "undermine initiatives...to better monitor employers' compliance with their commitments under the TFWP" and "prevent the Government of Canada from effectively assessing the impacts of the entry of the foreign national on the labour market." It continues:

> *For similar reasons, the Government of Canada also carefully limits the use of open work permits for family members of Temporary foreign workers, particularly in the current economic context, when many Canadians are seeking employment...Furthermore, Temporary foreign workers must understand the temporary context of their authorization to remain and work in Canada: when unemployed and unable to find employment, they are expected to return home at the end of their authorized stay. (Government of Canada 2009a)*

Thus, the federal government clearly did not take into consideration the difficulties of family separation during the periods of employment as a temporary foreign worker, periods that can last for several years.

In summary, while skilled temporary foreign workers may have access to permanent residency through the FSWP or CEC, these options are not available to the huge majority of lower-skilled foreign workers, who face practical or legal barriers in using these immigration programs. This situation reflects a clear policy goal: Canada wants lower-skilled workers to leave the country after a certain period of time and skilled workers to settle permanently. Family unit rules are a good illustration of this policy objective: the lower skilled are less likely to be able to demonstrate that they can support their dependents while in Canada because — unlike the spouses of skilled workers, who may obtain an open work permit — their spouses' work opportunities in Canada are limited. And yet low-skilled workers "have become extremely experienced and valuable employees," and are increasingly used by employers to fill permanent vacancies (Canadian Bar Association 2006, 9; see also Alboim 2009, 39). What is more, low-skilled workers hired under the low-skill pilot project are now implicitly encouraged to stay longer than before: work permits, initially valid for 12 months, were extended to 24 months in 2007, after which workers were to return to their country of permanent residence for at least four months before applying for another work permit; however, the requirement to return home was rescinded in early 2009 (CIC 2010b, 34), allowing workers to renew their permits from within Canada as many times as necessary without having to leave the country.

With the objective of confirming the "temporary" nature of the TFWP, one of the main regulatory changes proposed by CIC in October 2009 was to introduce a maximum stay of four years for temporary foreign workers, followed by a period of six years during which they would not be allowed to work in Canada. (It should be noted that there is no limit to the number of renewals under the current legislation [*IRPR*, section 201]). The federal government explained that, "This provision would signal clearly to both workers and employers that the purpose of the TFWP is to address temporary labour shortages, as well as encourage the use of appropriate programs and pathways to permanent residency in order to respond to the long-term labour needs of employers" (Government of Canada 2009b). Given the limited opportunities for lower-skilled workers to transfer from temporary to permanent resident status from within the country, this new approach would accentuate the two-tiered nature of the TFWP (Canadian Council for Refugees 2009) and reinforce the message that the skilled are welcome to settle here permanently, while the lower skilled are expected to leave when their temporary work permits expire.

PNPs: An interesting avenue to permanent residency for lower-skilled temporary foreign workers ?

For most lower-skilled workers, the only viable option for permanent residency is a PNP, which, as we explain below, comes with its own sets of limitations. A PNP is a federal-provincial agreement under which a province determines its own criteria for the selection of foreign workers, based on its demographic and labour market needs and priorities. Once selected by a province, applicants are granted permanent residency if they meet federal health and security requirements.[82] Provincial nominees are not subject to the requirements of the points system applicable to the FSWP, nor does CIC impose a minimum selection threshold for these candidates. In addition, PNP agreements do not require provinces or territories to obtain CIC's approval when they create new PNP categories; they are required only to inform CIC (CIC 2009d, 21).

The number of nominees under PNPs has grown at a rapid pace, from fewer than 500 in 1999 to more than 22,000 in 2008; the federal government anticipates 40,000 nominees annually in 2010 and beyond. By contrast, only 18,000 permanent residents admitted under the FSWP are anticipated by 2012 (CIC 2009d, 10; Office of the Auditor General of Canada 2009, 12). PNPs were initially developed in Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island, in part to attract and retain immigrants who would otherwise settle primarily in Ontario, British Columbia and Quebec (Akbari and Sun 2006; Carter, Morrish, and Amoyaw 2008). With western Canada's economy booming, however, Alberta and British Columbia developed their own PNPs, because "the Federal Skilled Worker Program was not meeting regional needs in terms of numbers, processing times, occupations and skills" (Alboim 2009, 34). Alberta started in fiscal year 2002/03 with just 62 nominees (Alberta 2009c), but the number is expected to reach 5,000 in 2010/11.[83]

PNPs have also become increasingly diverse and complex. A key aspect of PNPs is their uniqueness: a province tailors its criteria to select individuals who will contribute significantly to its economic development and who are likely to become successfully established. Given the varying

labour market needs of the provinces, this means concretely that "two temporary foreign workers with the same profile could have different opportunities to settle permanently based on the province or territory of their original work permit" (House of Commons Canada 2009, 10).

Before we summarize the preliminary findings of our current comparative research on the role of PNPs in enabling access to permanent residency from within Canada for temporary foreign workers,[84] it is important to note, first, that not all PNPs offer permanent residency to such workers. Alberta, British Columbia, Manitoba, Saskatchewan, Nova Scotia, Newfoundland and Labrador, and Yukon do, but there is no such opportunity in New Brunswick, Ontario or Prince Edward Island. Second, except in Manitoba, PNPs target primarily skilled workers; thus, even where lower-skilled workers employed in specific occupations may access permanent residency through a PNP, the growing unskilled portion of the TFWP is still largely excluded. Finally, PNPs in the context of temporary labour migration are employer driven: applications from temporary foreign workers for permanent residence through a PNP are tied to a job with a specific employer, so if the worker is laid off at any time prior to attaining permanent residency, the application for permanent residence may be (and actually often is) cancelled. In Alberta, for instance, if employment with an approved employer is terminated, the Alberta Immigrant Nominee Program (AINP) "reserves the right to withdraw its nomination" (Alberta 2009a). Temporary foreign workers in Alberta wait two to three years before obtaining their permanent residency; if they become unemployed a few months before permanent residency is granted, they must start the process all over again with a new employer, if they find one (Alberta Federation of Labour 2009, 18). In British Columbia, if the unemployed nominee fails to obtain employment in an occupation that is eligible under the nominee program within four weeks, the nomination will be cancelled. However, some industry associations, such as the BC Food Processors Association and the BC Trucking Association, work with sponsoring employers to place any nominee terminated without cause in an equivalent job with an eligible employer. Nominees are required to accept an equivalent offer of employment, otherwise the nomination is withdrawn (British Columbia 2009a).

As the first province to implement a PNP, Manitoba has successfully promoted its program as an effective mechanism to attract immigrants. Approximately 70 percent of all immigrants who land in Manitoba do so through the PNP (Bucklaschuk, Moss, and Annis 2009, 65). All temporary foreign workers are eligible to apply for permanent residence through the PNP after acquiring six months' work experience and with ongoing employment in the province. This is the "employer direct" stream, which has no specific NOC requirement. To be considered for nomination, candidates must demonstrate that they have: (1) a formal offer of a long-term, full-time job with a Manitoba employer; (2) the training, work experience and language ability required for the job they have been offered; and (3) the intention and ability to settle permanently in Manitoba (Manitoba 2009a). For example, the vast majority of temporary foreign workers employed by Maple Leaf Foods' hog-processing facility in Brandon have been approved for provincial nominee status (it is worth noting that access to permanent residency is a provision in Maple Leaf Foods' collective agreements across Canada). In Manitoba, temporary foreign workers are "considered a source of permanent immigrants...as their temporary status is but the first step along the path to permanent immigrant status" (Bucklaschuk, Moss, and Annis 2009, 65-6). However, Manitoba is an isolated example: nowhere else in Canada is

it possible to refer to temporary foreign workers as "transitional workers," as the Manitoba government and some researchers do.

Alberta, British Columbia and Saskatchewan have recently expanded the range of occupations from which temporary foreign workers may be nominated to include NOC C and D occupations in specific industries. In Alberta, for instance, workers may be considered for nomination under the semi-skilled workers category in the food and beverage processing, hotel and lodging, manufacturing, long-haul trucking, and food services industries. In the food services industry, a pilot project aimed at addressing labour shortages is limited to 600 nomination allocations for three eligible occupations: food and beverage servers (NOC 6453-C), food counter attendants (NOC 6641-D) and kitchen helpers (NOC 6641-D). When the 600 allocations have been approved, no further applications under this pilot project will be accepted or assessed (Alberta 2009c). In Saskatchewan, under the Hospitality Sector Project, the only foreign workers who can be nominated are those currently working as food and beverage servers, food counter attendants, kitchen helpers and housekeeping and cleaning staff (Saskatchewan 2009a,b).

PNPs differ in their eligibility criteria, program size and application processing times. In Alberta, for instance, the current employer direct stream processing time is 10 months; in Saskatchewan, the processing time under the Saskatchewan Immigrant Nominee Program is 4 to 8 months (Alberta 2009b; Saskatchewan 2009b); and in Manitoba, processing time for the employer direct stream is 4 to 7 months, although in 2007 more than 50 percent of applications were processed within 4 months (Manitoba 2009a,b). In British Columbia, where initial conditions may be more difficult to meet — the applicant must have worked for at least 9 months prior to the date of application in a field that offers "good long-term prospects" — processing times are just five to eight weeks (British Columbia 2009b). According to CIC, the processing time for a permanent residence application from a provincial nominee, which is always processed outside of Canada, generally takes 11 months to finalize (CIC 2009c).

Although PNPs differ in detail, they share a few common characteristics. First, lower-skilled temporary foreign workers with a full-time permanent job offer from their employer and who have worked for that employer in the hospitality, long-haul trucking or food and beverage processing industry for at least six months (Alberta and Saskatchewan) or nine months (British Columbia) have a chance of obtaining permanent residence through a nominee program. Second, these programs impose obligations on the employer "that are designed to ensure both that the employer is not exploiting the worker and that the worker will be able to integrate into the provincial labour market" (Fudge and MacPhail 2009, 13). In Alberta, for instance, the employer must (1) demonstrate that accommodation for the nominee candidate is available at a cost that does not exceed 33 percent of the candidate's gross salary; (2) ensure that the candidate is competent in understanding, reading, speaking and writing English prior to nomination; and (3) provide a Foreign Worker Settlement Plan that identifies opportunities for career advancement training, activities undertaken to help the worker integrate into the workplace and the type of assistance that will be provided to the worker's family when it arrives in Alberta. The employer must also attach an Employer Compliance Declaration Form to their application, responding to questions about the status of their business with

Employment Standards, the *Public Health Act*, occupational health and safety, workers' compensation and human rights. As the Alberta government notes, "The AINP supports all legislation regarding a safe and healthy work environment, and will not approve any employer who does not adequately demonstrate compliance in meeting the AINP criteria and applicable administrative and regulatory agencies regarding their legislation" (Alberta 2009c). Third, all temporary foreign workers applying for permanent residency through a PNP must have basic proficiency in English prior to nomination. If they do not, the employer must cover the costs of language training, at least in Alberta and British Columbia.

One often reads about variations in PNPs that affect the "opportunities" for temporary foreign workers to make the transition to permanent residency (House of Commons Canada 2009, 10), but what, in fact, are those opportunities? As we have seen, not all lower-skilled workers can access permanent residence from within Canada through a PNP, but must fit into "narrow boxes" that are employer driven — a full-time permanent job offer from a local employer in one of the few eligible occupations in demand — and if the worker becomes unemployed, the whole application process is likely to be cancelled. A deeper understanding of the real potential of PNPs to allow access to permanent residence for temporary foreign workers is particularly necessary, given that the number of provincial nominees is growing at the expense of the FSWP and it could become the largest category of economic immigrants to Canada by 2012. Concerns also have been raised that PNPs are growing "without the benefit of common standards or a national framework" (Alboim 2009, 34), and the need for a determination of "the extent to which PNPs are meeting their objectives and achieving their expected outcomes" has been stressed (Office of the Auditor General of Canada 2009, 15). In an effort to address these concerns, CIC has announced its intention to evaluate PNPs from a national perspective for fiscal year 2010/11 (27).

As we have seen, avenues currently available for transitioning from temporary to permanent status from within Canada are almost exclusively the preserve of skilled temporary foreign workers. This means that lower-skilled workers lack a pathway to settle permanently in the country, even though employers are using them to fill long-term and even permanent vacancies. Family unit rules and the proposed introduction of a four-year limit on temporary work visas are clear examples of initiatives aimed at discouraging lower-skilled workers' long-term integration: people continue to be employed in Canada on a temporary basis with no possibility of family reunification; they leave when their visas expire, "requiring employers to recruit and train other temporary workers to replace them" (Alboim 2009, 44).

Canada's stated objective, which is to recruit temporary foreign workers to fill low or unskilled jobs for several years and then to show them the way out, should be the subject of a public discussion and should involve all key players beyond the governmental sphere. It is not clear how such an objective actually addresses current and future skills and labour market shortages. Moreover, although the federal government has demonstrated its commitment to immigration by investing in settlement programs, temporary foreign workers (even long-term residents) are, for the most part, disqualified from this much-needed aid. Therefore, policies to support long-term temporary foreign workers and to allow them to move to permanent resi-

dency are needed. Finally, there is no simple answer to a complex situation that is no longer "truly temporary" and that affects the everyday life and well-being of thousands of people during and after their stay in Canada.

Conclusion

The legal treatment temporary foreign workers may expect to receive in Canada and their chances of integration depend to a great extent on their employment-related rights and their concrete opportunities to achieve a more secure status. Our study makes an important point regarding Canadian policy toward the treatment of temporary foreign workers: that Canada's rules on the legal status of migrants admitted for employment have been largely structured according to one policy model for lower-skilled workers, to discourage their integration, and two simultaneous policy models for skilled workers, to both discourage and assist their eventual integration. Concretely, this means that temporary foreign workers are limited in their ability to take advantage of full participation, full integration and full protection because of the practical and legal parameters placed around their employment-related rights. However, in contrast to lower-skilled workers, skilled workers are offered opportunities to access permanent residency. If a proposed amendment enters into force to limit temporary foreign workers to a maximum stay of four years, followed by a period of at least six years during which they cannot work again in Canada, this would represent a third policy model that effectively would explicitly prevent the integration of lower-skilled temporary foreign workers into Canadian society.

As we have shown in this study, the significant increase in the number of temporary foreign workers has led to a growing concern about their employment-related rights. If, on paper, such workers have the same workplace rights as any other workers in Canada, this is not true in reality. And while only a small minority of employers unscrupulously exploit temporary foreign workers, violations of labour and employment law are increasing. Recent Alberta government reports, for example, suggest that three-quarters of inspected businesses that employ temporary foreign workers broke the province's employment rules (Cotter 2010).

One of the main weaknesses of the TFWP is the strict conditions that are imposed on work permits, which are employer specific and limit not only the rights a temporary foreign worker might otherwise exercise, but also the ability of the federal and provincial governments to protect the worker from exploitation. Temporary foreign workers might be ineligible for EI because they are legally restricted from new employment. They might find workers' compensation to be insufficient if it is cut off merely because the worker is physically, but not legally, able to be employed. They might find that the single week of termination pay available to them under the Alberta *Employment Standards Code* does not cover the months of unemployment they can expect. Since they lack employment mobility, they are more likely to suffer from abusive employer practices rather than risk being unemployed. Finally, restrictions on work permits do not help provinces to fulfil short-term labour market needs or employers to fill vacancies immediately. In certain industries, it would make much more sense if temporary foreign workers were free to move from one employer to another. And it would benefit employers if such workers could move from one location to another as the need arose. For these reasons, and in order to reduce the power imbalance

that exists between employers and temporary foreign workers, it is essential that the employer-tied work permit be replaced by a sector- or province-specific work permit.

Another problem is the lack of effective mechanisms to protect the rights of migrant workers at work. Reliance on a complaint-based mechanism to enforce basic provincial labour standards does little to address the unique vulnerabilities of temporary foreign workers, including language and cultural barriers in the workplace and their fear of being deported. Temporary foreign workers might call public attention to employment law issues, but they need to understand what their rights are, whom they should talk to and what steps they should take. Perhaps most important, they need to see that the benefits of speaking out outweigh the inherent risks. Therefore, it is important that more proactive and protective measures be developed, such as hiring more inspectors and initiating inspections, to address the workplace problems of temporary foreign workers. What is more, the authority of an Employment Standards officer to address violations of an employment contract is strictly limited to what is prescribed by the terms of provincial legislation. The Alberta example shows there is no responsibility at either the federal or the provincial level for enforcing particular contractual rights, such as employer-paid transportation, in the low-skill pilot project.

Moreover, although the enforcement of labour standards falls outside the jurisdiction of the federal government, which retains the sole authority to decide which employer can hire a temporary foreign worker, there are several tools it could use to promote employer monitoring and compliance. To its credit, Ottawa has proposed a set of factors to guide the assessment of the genuineness of an employer's offer of employment, which could lead to a more systematic and rigorous approach to the assessment, and to restrict an employer's eligibility to access the TFWP for two years if that employer is found to have provided significantly different wages, working conditions or occupations than it initially offered. But the federal government cannot rely on temporary foreign workers to denounce abusive employers, so an effective mechanism must be implemented to monitor employers' compliance with their obligations and to prosecute those who have broken the law. Moreover, temporary foreign workers should not be held responsible for accepting employment from an ineligible employer, since it is difficult for them to know that an employer has been administratively banned from the TFWP.

In addition, a greater level of communication and transparency between the two levels of government is critical to resolving some of the employment-related challenges unique to temporary foreign workers. To facilitate better communication, CIC and HRSDC have entered into information-sharing agreements with some provinces — Alberta, British Columbia and Manitoba — to support the enforcement of federal and provincial laws and standards.

Provincial governments also should take concrete steps to assist and protect temporary foreign workers — thus far, only Alberta and Manitoba have done so. In Alberta, the Temporary Foreign Worker Helpline and temporary foreign worker advisory offices direct workers with employment problems to the appropriate administrative body or service. However, they serve only as referral points and coordination agencies, and rarely take concrete action on behalf of foreign workers except in cases of extreme emergency. They also do not inspect businesses

that employ temporary foreign workers, but work closely with Employment Standards officers who conduct work sites inspections. In Manitoba, the *Worker Recruitment and Protection Act* requires employers to register with the province before they can recruit a temporary foreign worker. The legislation also authorizes workplace monitoring, and imposes penalties on employers who fail to comply. The province has the authority to refuse or revoke a licence and to recover monies from employers and recruiters on behalf of temporary foreign workers. Because of its strong monitoring mechanism, the Manitoba legislation is a more concrete measure than the temporary foreign worker advisory offices in Alberta

Illegal recruitment practices are also a serious issue. While the regulation of recruitment agencies is a provincial matter, in Alberta there is no effective enforcement of the rule prohibiting recruitment fees. Alberta and the other provinces should follow the example of the Manitoba *Worker Recruitment and Protection Act*, which strictly prohibits charging fees to workers as part of the recruitment process, and includes enforcement provisions to ensure employers and third-party recruiters comply with its requirements. HRSDC/Service Canada collaborates with Manitoba to support the implementation of this legislation. Further, the federal government could be more proactive in investigating and penalizing unscrupulous immigration consultants.

In sum, it is important to address temporary foreign workers' special needs at a systemic level. It is also essential to adopt a multifaceted approach to protecting such workers, both in their country of origin and in Canada, and with the cooperation of all players involved in administering the TFWP.

Finally, despite official claims that the TFWP is temporary, temporary foreign workers have become a pervasive feature of the Canadian labour market (Sharma 2006; Preibisch 2007). This highlights the need to reconsider the increasingly short-term focus of Canada's labour migration policies, which is unrealistic and will not help Canada achieve its long-term goals of promoting population and labour force growth. Focusing on the short term is also unfair to the vast majority of temporary foreign workers, who are expected to spend years in Canada without contributing to our society in the long run. It sends a message that Canada wants lower-skilled individuals only as workers but skilled individuals as future citizens.

The fundamental question, therefore, is whether it is really in Canada's best interest to have policies that do not support the lower-skilled temporary foreign worker and that do not give such workers the option to become permanent residents. There is a need for a wider public debate on these federal policies, which are aimed at transforming the landscape for economic immigration to Canada.

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Notes

1 Canada's population, like that of other G8 countries, is greying as the number of people aged 65 and over increases and the number of children declines. In 2006, seniors made up 13.7 percent of Canada's population, up from 10.7 percent 20 years earlier, while the proportion of the population under 15 fell to 17.7 percent, down from 21.3 percent in 1986 (Statistics Canada 2008).

2 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

3 The NOC is a standard that classifies and describes all occupations in the Canadian labour market according to skill types: "0" type are senior and middle-management occupations; "A" type are professional occupations); "B" type are technical and skilled trade occupations; and "C" and "D" types are occupations requiring lower levels of formal training.

4 *The Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3, sections 91, 92 and 95.

5 Canada and Quebec have had immigration agreements since 1971, and Quebec has had the power to select Quebec-destined economic immigrants since 1978. Therefore, Quebec has no need of a PNP agreement.

6 Although the provinces have a constitutional right to be involved in immigration to their territory (*Constitution Act, 1867*, sections 91.25 and 95), the balance of federal versus provincial regulation of immigration has differed throughout Confederation. During the late nineteenth century, provinces (especially British Columbia) legislated on certain immigration-related matters, largely to prevent the immigration of certain populations based on racial prejudice (most notably, Chinese). In the twentieth century, due to the need for a more unified immigration policy, attempts at provincial regulation of immigration decreased and the legislation on immigration and on the administration of the immigration system became almost exclusively a federal matter, except in Quebec.

7 *Immigration and Refugee Protection Regulations*, SOR/2002-227.

8 Some people are allowed to work in Canada without a work permit, but they are not admitted into Canada under the TFWP. Some common categories of work permit exemptions are business visitors, after-sales service, on-campus employment, performing artists, athletes and coaches, news reporters, public speakers, convention organizers, clergy, health care students and crew (*IRPR*, sections 186 and 187). In addition, in certain circumstances — for example, under the North American Free Trade Agreement, for intracompany transfers or for youth exchange programs — foreign nationals in Canada can receive a work permit without HRSDC having approved a job offer (sections 204 to 208).

9 Concerns have been raised about how the actual rates are set and about the process for setting them. The House of Commons Standing Committee on Citizenship and Immigration has called for more transparency and stakeholder input in calculating prevailing wage rates (House of Commons Canada 2009, 24; see also Fudge and MacPhail 2009, 6-7). In response to these criticisms, HRSDC has issued revised instructions aimed at providing clearer and more consistent evaluation criteria. Acknowledging the progress that has already been made, the Auditor General has recommended that HRSDC also provide clear directives, tools and training to officers engaged in issuing LMOs, and implement a framework to ensure the quality and consistency of opinions across Canada (Office of the Auditor General of Canada 2009, 31).

10 *IRPR*, sections 198, 199.

11 *IRPR*, sections 179, 200. A temporary foreign worker may intend eventually to apply for permanent residence or may have an application in process, but the officer must be satisfied that the applicant will leave Canada at the end of the temporary period authorized, regardless of a future decision with respect to permanent status (*IRPA*, section 22(2); *IRPR*, section 183; CIC 2009f, 5-7).

12 *IRPR*, section 70.

13 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with Susan Wood and Sarah Eadie, Edmonton Community Legal Centre, Edmonton, Alberta, June 9, 2009.

14 Alberta, *Employment Agency Business Licensing Regulation*, Alta Reg. 189/1999; Alberta, *Fair Trading Act*, R.S.A. 2000.

15 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with Susan Wood and Sarah Eadie, Edmonton Community Legal Centre. Edmonton, Alberta, June 9, 2009.

16 Interview with Jeff Cowlings, Manager, Temporary Foreign Worker Advisory Office, Edmonton, Alberta, June 16, 2009.

17 *The Worker Recruitment and Protection Act*, S.M. 2008, c. 23; *Worker Recruitment and Protection Regulation*, C.C.S.M. c. W197. Regulation 21/2009.

18 Section 118 of the *IRPA;* sections 279.01 to 279.04 of the Criminal Code.

19 See, among others, *Sheikh v. Canada* [1990] 3 F.C. 238 (C.A.); *Rohini v Canada (Minister of Citizenship and Immigration)* 2005 FC 1488; *Ghahremani v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1494.

20 *IRPR*, section 201.1. Temporary foreign workers are allowed to apply to change or extend their work permit from within Canada before it expires by mailing their application to the Vegreville, Alberta, Case Processing Centre (*IRPR*, section 201.1). Although a workers can submit his or her application on the last day of the work permit (section 201(1)), a CIC form stipulates: "If your current temporary resident status is still valid you can apply for an extension of your stay providing you apply at least 30 days before the expiry date of your current status" (CIC 2010a, 3). In practice, however, a temporary worker can mail his or her application (with a tracking number) on the last date of expiry to Vegreville (Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication).

21 *IRPR*, section 182.

22 *IRPR*, section 186(u); section 124(1)(b) and (c).

23 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009.

24 Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication.

25 Interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009.

26 Interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009; interview with Randy Gurlock, Citizenship and Immigration Canada, Ottawa, June 8, 2009.

27 *IRPR*, sections 228(1)(c)(iv), 229(1)(n).

28 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with Susan Wood and Sarah Eadie, Edmonton Community Legal Centre. Edmonton, Alberta, June 9, 2009.

29 *Employment Insurance Act*, sections 7(1), (2), (3) and 18(a)). Qualifying periods range from 420 hours if the rate of unemployment is more than 13 percent to 700 hours if the rate of unemployment is 6 percent or less. In November 2009, the unemployment rate in Alberta was 7.5 percent. Since October 2008, Alberta's employment has fallen by 3.3 percent, the steepest rate of decline among all provinces (Statistics Canada 2009). For a new entrant to the workforce, the number of qualifying hours is 910 hours (*Employment Insurance Act*, 1996, section 7(3)).

30 *The Attorney General of Canada v. Cornelissen-O-Neill*, (A-652-93), Federal C.A. at para. 1.

31 CUB 43501, Simmons (Jerome, J.), December 21, 1998.

32 CUB 69684, De Guzman (Tannenbaum, J.), December 10, 2007.

33 *Employment Insurance Act*, S.C. 1996, c. 23.

34 CUB 44956, Juris (Haddad, Q.C.), May 20, 1999.

35 For a complete list of all case law in that field, see Service Canada, "The Index of Jurisprudence A Supplement to the Digest of Benefit Entitlement Principles." Accessed November 1, 2009. http://srv130.services.gc.ca/indexjurisprudence.

36 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with Susan Wood and Sarah Eadie, Edmonton Community Legal Centre. Edmonton, Alberta, June 9, 2009.

37 Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication.

38 *Employment Standards Code*, R.S.A., 2000, c. E-9.

39 *Employment Standards Code*, section 3, and see *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, 15 C.C.E.L.(2d) 182 (C.A.). A person who chooses to take an issue up with Employment Standards is stopped from pursuing the same matter in court proceedings.

40 *Employment Standards Code*, sections 1(j) and 1(x)(iii); Interview with Dan Scott, Seveny Scott Lawyers, Edmonton, Alberta, June 11, 2009.

41 Interview with Gerhard Seifner, McLennan Ross LLP, Edmonton, Alberta, June 22, 2009.

42 Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication.

43 Interview with Dan Scott, Seveny Scott Lawyers, Edmonton, Alberta, June 11, 2009. Note that the provincial courts hear civil suits where the plaintiff claims damages of less than $25,000.

44 *IRPA*, sections 47, 48, 52.

45 *Employment Standards Code*, section 82(4).

46 *Employment Standards Code*, sections 86, 89, 89(4). Note that under sections 1(j) and 1(x), the term "wages" does not include termination pay; therefore, an officer only has the authority to enforce the termination pay as prescribed by the Act.

47 *Employment Standards Code*, section 56.

48 *Alberta Employment Standards Regulation*, section 5.

49 Interview with Dan Scott, Seveny Scott Lawyers, Edmonton, Alberta, June 11, 2009.

50 *Workers' Compensation Act*, R.S.A., 2000, c. W-15, section 14.

51 Interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

52 Interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009; anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009.

53 Interview with Gerhard Seifner, McLennan Ross LLP, Edmonton, Alberta, June 22, 2009.

54 Interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

55 Interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

56 *Workers Compensation Act*, section 140.1. An employer might be tempted to obstruct an employee's reporting for a number of reasons. For example, premiums are based partly on the employer's previous claims history, and an unblemished claims history can be an important component of an employer's successful bid on a project (interview with Dan Scott, Seveny Scott Lawyers, Edmonton, Alberta, June 11, 2009).

57 However, there might be such a remedy available under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14.

58 *Workers' Compensation Act*, section 26.

59 Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009; interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

60 *Workers' Compensation Act*, sections 33 and 34. In one case, however, a worker was flown outside the jurisdiction and treated there in order to avoid such a report (interview with Dan Scott, Seveny Scott Lawyers, Edmonton, Alberta, June 11, 2009).

61 Interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

62 *Workers' Compensation Act*, section 56(8) and (9); section 63; also Workers' Compensation Board-Alberta (2004b).

63 Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009; interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

64 Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009; interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

65 Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009.

66 *Workers' Compensation Act*, section 54. The WCB may also designate a file as "inactive" if a claimant fails to communicate in a timely manner (interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009). There is no strict time limit for closing a file, and an "inactive" file can be "activated" when communication continues, but the WCB will question why the file was inactive for so long, and will consider that the worker has imperilled the injury.

67 Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009.

68 Interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009; interview with Randy Gurlock, Citizenship and Immigration Canada, Ottawa, June 8, 2009.

69 Interview with Jeff Cowlings, Manager, Temporary Foreign Worker Advisory Office, Edmonton, Alberta, June 16, 2009.

70 Interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009.

71 Interview with Jeff Cowlings, Manager, Temporary Foreign Worker Advisory Office, Edmonton, Alberta, June 16, 2009; interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009.

72 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009.

73 Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009.

74 It is technically impossible for seasonal workers admitted to Canada under this program to access permanent residency from within Canada: the work permit is valid for one period of eight months, is nonrenewable and workers must leave the country after the expiration of this period.

75 *IRPA*, section 22(2); *IRPR*, section 183.

76 *IRPA*, sections 110 to 115.

77 *IRPA*, section 12(2); *IRPR*, section 76(2).

78 *IRPR*, sections 76(1)(b) and (2); sections 78-83.

79 *IRPR*, section 87.1.

80 Section 5.25 ("Work Permits requiring HRSDC confirmation R 203") of CIC 2010b was revised in July 2009, September 2009 and February 2010. We are quoting here from an earlier version (May 2009, 32, hard copy on file with authors).

81 We are quoting here from the previous version of a CIC document (2009e), which is dated September 2009 (hard copy on file with the authors).

82 *IRPR*, section 87.

83 The last figure is from Brad Trefan, Senior Director, Alberta Immigrant Nominee Program.

84 In summer 2009, Delphine Nakache, with France Houle (Université de Montréal) and Sasha Baglay (University of Ontario Institute of Technology), started a research project entitled "Provincial Nominee Programs: Implications for Policy and Practice," on provincial differences and similarities regarding the administration of PNPs and the varying opportunities for temporary foreign workers to access permanent residence from within Canada. In the winter of 2010, Delphine Nakache invited immigration officials to participate in this research by answering a short questionnaire aimed at identifying each province's PNP streams and selection criteria and identifying PNPs that offer opportunities for low-skilled, semi-skilled and highly skilled workers and their family members. The data from the questionnaire will be used as a complementary source of information and will help complete the documentary analysis that is currently being undertaken.

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Abbreviations

AINP	Alberta Immigrant Nominee Program
CBSA	Canada Border Services Agency
CEC	Canadian Experience Class
CIC	Citizenship and Immigration Canada
CSIC	Canadian Society of Immigration Consultants
EI	employment insurance
e-LMO	Expedited Labour Market Opinion
FSWP	Federal Skilled Worker Program
HRSDC	Human Resources and Skills Development Canada
IRPA	*Immigration and Refugee Protection Act*
IRPR	*Immigration and Refugee Protection Regulations*
LMO	Labour Market Opinion
LICP	Live-in Caregiver Program
NOC	National Occupational Classification
PNP	Provincial Nominee Program
SAWP	Seasonal Agricultural Worker Program
TFWP	Temporary Foreign Worker Program
WCB	Workers' Compensation Board

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